Petition

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Case No. 81-861

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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT LEWIS BUFORD,

Cross-Petitioner,

vs.

STATE OF FLORIDA,

Cross-Respondent.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

ATTORNEYS FOR CROSS-PETITIONER

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THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether, during the penalty phase of a capital trial, the failure to instruct the jury that the mitigating circumstances which can be considered are not limited to those enumerated in the statute, violates the Eighth and Fourteenth Amendments?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this cross-petition is reported at 403 So.2d 943, and it is reproduced in the appendix to this petition. (A1-19)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on July 23, 1981. (A1-19) Rehearing was denied on October 14, 1981. (A20) Cross-Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28, United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confer certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1, to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141, Florida Statutes (1977) which is set forth in the Appendix. (A21-23)

STATEMENT OF THE CASE

Robert Lewis Buford, the Cross-Petitioner, was indicted in Polk County, Florida for first degree murder, sexual battery and burglary. (R13-16)[1/] He proceeded to a bifurcated jury trial as required in capital cases under Florida law. §921.141, Fla.Stat. (1977) The jury found him guilty of all three crimes as charged. (R1105-1107)

Before the penalty phase of the trial, Buford requested certain jury instructions regarding the manner in which the jury should consider the aggravating and mitigating circumstances. (R933-934,1111)(A24-26) One requested instruction advised that aggravating circumstances were restricted to those enumerated in the statute, Section 921.141, Florida Statutes (1977), but that mitigating circumstances were not so limited. (R933-934,1111)(A24-26) The trial judge denied the request and refused to give the instruction (R933-934,1111)(A24-26), relying instead upon standard instructions promulgated by the Florida Supreme Court. (R973-980)(A27-34)

Althouth Buford's trial counsel was permitted to present evidence of nonstatutory mitigating circumstances and argue the use of such evidence to the jury (R960-961), the jury was never instructed that such evidence could be considered. (R973-980)(A27-34) Pertinent portions of the instructions given to the jury read:

> The aggravating circumstances which you may consider are limited to such of the following and may be established by the evidence:
>
> (a) That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

[1/] Page references to the record on appeal are designated by the prefix "R." References to the appendix to this petition are designated by the prefix "A."

(b) That at the time of the crime for which he was to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

(c) That the defendant in committing the crime for which he is to be sentenced knowingly created a great risk of death to many persons.

(d) That the crime for which the defendant is to be sentenced was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, arson, sexual battery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) That the crime for which the defendant is to be sentenced was committed for pecuniary gain.

(g) That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile. Cruel means designed to inflict a high degree of pain; utter indifference to or enjoyment of the suffering of others. Pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment. Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether such mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider if established by the evidence as these:

(a) That the defendant has no significant history of prior criminal activity.

(b) That the sentence for which the defendant is to -- excuse me. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) That the victim was a participant in the defendant's conduct or consented to the act.

(d) That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor.

(e) That the defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(R974-976)(A28-30)

On appeal, Buford asserted that Section 921.141, Florida Statutes (1977) was unconstitutional in violation of the Eighth and Fourteenth Amendments because the statute, and the jury instructions based on that statute, limited consideration of mitigating circumstances to those enumerated in the statute. The Florida Supreme Court held that "the standard jury instructions adequately covered the instructions on mitigating circumstances." (A10)

REASONS FOR GRANTING THE WRIT

DURING THE PENALTY PHASE OF A CAPITAL TRIAL, THE FAILURE TO INSTRUCT THE JURY THAT THE MITIGATING CIRCUMSTANCES WHICH CAN BE CONSIDERED ARE NOT LIMITED TO THOSE ENUMERATED IN THE STATUTE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court held Ohio's death penalty statute unconstitutional in violation of the Eighth and Fourteenth Amendments because mitigating cir-

cumstances were limited to those enumerated. The plurality opinion of the Court stated, "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." Id., at 608. Soon after Lockett, the Supreme Court of Florida issued an opinion in Songer v. State, 365 So.2d 696 (Fla.1978) on rehearing, which held that Florida law did not limit mitigating circumstances to those listed in the statute.

Prior to Lockett and Songer, Florida law was not clear that mitigating circumstances were unlimited. In fact, language in Cooper v. State, 336 So.2d 1133 (Fla.1976) indicated that the list of statutory mitigating factors were exclusive:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).7/
>
> 7/ The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6): (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist...." (Emphasis added.) This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

Id., at 1139. It was during this period before Lockett and Songer that Buford was tried, convicted and sentenced to death.2/

2/ Lockett v. Ohio, 438 U.S. 586 (1978) was decided on July 3, 1978. Songer v. State, 365 So2.d 696 (Fla.1978) on rehearing

The instructions to the jury in this case failed to apprise the jury that mitigating circumstances were not limited to those listed in Section 921.141, Florida Statutes (1977). Although the jury instruction stated that aggravating circumstances were limited,

* * *

> The aggravating circumstances which you may consider are limited to such of the following and may be established by the evidence:
>
> [list of factors omitted]

* * *

(R971)(A28), the instruction merely said the following about mitigating circumstances:

* * *

> The mitigating circumstances which you may condiser if established by the evidence as these:
>
> [list of factors omitted]

* * *

(R976)(A30) This instruction's parallel construction lead the jury to believe that the mitigating circumstances, like the aggravating ones, were limited.

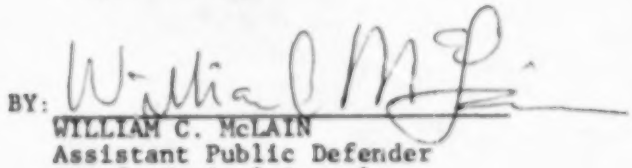
The trial court should have granted Buford's requested instruction (A24) to clarify the law for the jury. As given, the penalty instructions mislead the jury and violated Petitioner's rights under the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586 (1978).

2/con't. was decided on December 21, 1978. Robert Buford's trial began on March 27, 1978 and ended on March 30, 1978. He was sentenced on March 31, 1978.

CONCLUSION

Upon the foregoing reasons, Cross-Petitioner Buford asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals
495 N. Carpenter Street
Bartow, Florida 33830-3798
(813)533-6715 or 533-1184

Member Of The Bar Of The United States Supreme Court

APPENDIX

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Supreme Court of Florida

No. 54,010

CORRECTED COPY

ROBERT LEWIS BUFORD, Appellant,

v.

STATE OF FLORIDA, Appellee.

[July 23, 1981]

ADKINS, J.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and guilty of sexual battery upon a child under eleven years of age, and imposing two sentences of death. Defendant was also adjudged guilty of burglary with intent to commit a sexual battery and sentenced to a term of years.

In the early morning hours of Sunday, November 6, 1977, Lewis Wright, father of the victim, fell asleep on the living room sofa while he and his children were watching television. His children were on a pallet on the living room floor. Wright awakened about 2:30 or 3:00 o'clock a.m., turned off the television, and went to his bedroom. He did not notice if all of his children were still sleeping on the pallet. On his way to the bedroom he observed that the back door of the house was open, but assumed that the children's grandmother had visited the house while he was sleeping and had exited through the back door.

Lewis Wright awoke again about 7:00 o'clock a.m. and noticed that the victim, his seven-year-old daughter, Toni, was missing. Wright notified police; shortly thereafter the victim's body was discovered next to a nearby church. She was lying on her back in a flower bed, with her dress pulled up around her

A1

chest and her underpants a short distance away. There were injuries to her head and dried blood on her head and face. Pieces of a shattered and blood-stained concrete block were found nearby.

At approximately 3:00 o'clock a.m. on Sunday, November 6, 1977, the defendant returned to his father's home where he was greeted by his sister, Annetta Buford. She observed him breathing hard, as if he had just been running and saw him carrying his t-shirt and tennis shoes. He had white oxydized paint on his bare back and appeared to be drunk. Defendant told his sister if anyone came looking for him to say that he had been at home since 11:00 o'clock p.m. In a few moments defendant broke down and stated that he might have killed a lady with a brick. He started to implicate a person known as "Fat Boy", but immediately stopped, saying he was not going to involve anyone else.

While at his father's home later in the day, the defendant talked both of leaving home and of turning himself over to police. On Monday night defendant went to the police station, after his sister had talked with police about his role in the crime. He was arrested for murder, sexual battery, and burglary with intent to commit sexual battery. After being advised of his legal rights, defendant signed a written waiver of these rights and blurted out, "I did it." He was again advised of his rights in the interrogation room, and he again waived these rights. In his statement defendant said he broke into Wright's house through a back window. Upon entering, he saw the girl lying there, picked her up, and carried her out the back door. He took her to the church area, had her lie down and remove her clothes. He removed his clothing and then inserted his finger into her vagina. He did not move his finger; he just put it in and later took it out. He admitted penetration with his penis. When the victim started screaming, the defendant picked up a concrete block and dropped it twice on the victim's head. The defendant

said he was not trying to kill her but to stop her from screaming. The victim had recognized the defendant.

After the statement was concluded, the defendant signed a consent form to search his room at his father's house for the jeans he had been wearing on the night of the incident. These jeans were recovered. A lab analysis of a blood spot on the jeans indicated that it was of the same type as the victim's blood.

With defendant's consent, the officers secured blood and hair samples from him. While the doctor was examining defendant and taking samples, the doctor pointed out various cuts and scratches on defendant's body. When the doctor was noting a set of scratches, the defendant said, "Those were not made by the little one."

A pubic hair that was discovered in the victim's vagina was consistent in characteristics with the sample taken from the defendant. Both the pubic hair found on the decedent and the sample taken from the defendant contained an unusual "starchy" substance. The child was too young to have pubic hair of her own; she was only seven years old.

At trial, the defendant testified that although he had participated in the sexual battery, a man known as "Fat Boy" had raped and killed Toni. Defendant said he refused to climb inside the Wright home because he was known by them. His testimony was that Fat Boy climbed through the window while defendant stood outside. When Fat Boy did not return for a while, defendant left. A few minutes later defendant met Fat Boy again. This time Fat Boy was carrying Toni Wright. Upon questioning her, Toni said that she knew defendant but did not know Fat Boy. Fat Boy carried Toni to the church area and commanded her to lie down. Defendant admitted having sexual intercourse with Toni while Fat Boy watched. Toni did not scream while defendant was on top of her. Defendant got dressed and was planning to leave when Fat Boy commenced sexual intercourse with Toni. Toni started screaming. Defendant turned around to face them and saw

Fat Boy drop a concrete block on the girl's head. Fat Boy picked up the brick to drop it again and defendant charged at him to prevent it. Fat Boy threw defendant against the wall and dropped the brick again. Fat Boy left when defendant refused to allow him to go home with him.

The police officers learned about Fat Boy and his alleged involvement in the incident from the defendant's sister before the trial took place. After an investigation, Fat Boy was eliminated as a suspect by virtue of an alibi. Defendant was charged by indictment with the offenses of first-degree murder, capital sexual battery, and burglary with intent to commit a sexual battery. The jury found defendant guilty on all three counts. The case then proceeded into the penalty phase of the bifurcated trials. The jury recommended to the court that it impose a life sentence on both the murder and sexual battery convictions. The trial court then made the following findings of fact:

> In making the following findings of fact and conclusions of law the Court has taken into consideration only the testimony produced at trial and no other factors.
>
> As to Count One of the Indictment wherein the defendant was convicted of First Degree Murder the Court makes the following findings of fact:
>
> 1. As an aggravating circumstance, the capital felony, that is, the murder of Toni Annette Wright, a black female, age seven (7) years, was committed while the defendant, Robert Lewis Buford, was engaged in the commission of the crime of sexual battery. F.A. 921.141(5)(d). The evidence is conclusive that the crime of sexual battery was complete and that sufficient penetration occurred. The defendant's free and voluntary statement to law enforcement officers supports this finding together with his testimony in his own behalf during the trial. The defendant attempted to repudiate his previous confession to create an accomplice by the name of "Fat Boy", however, the Court specifically rejects this testimony as being an untrue and a total fabrication.
>
> 2. As a further aggravating circumstance the Court finds that the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). The testimony amply supports a finding that this seven (7) year old child was abducted from her home while asleep by a nineteen (19) year old adult male, that she was taken to a secluded spot where the defendant brutally sexually assaulted her. After he had fulfilled his lustful desires and ascertained that the victim would be in a position to identify

him, the defendant snuffed out the life of this child by crushing her head with a concrete block dropped at heights from at least waist high. The testimony of the pathologist, Dr. Robert Smith, reveals at least three (3) separate crushing wounds and the defendant "admits" to dropping the thirty-two (32) pound concrete block on the victim's head twice. The Court specifically rejects as untrue and as a fabrication, the defendant's testimony that the victim was killed by this so called accomplice "Fat Boy". Dr. Robert Smith viewed the victim's body at the scene and testified that the child was covered with sand and that there was evidence of an extensive struggle. The Court finds that the struggle was between the defendant and the seven (7) year old child and that no other person was involved. The pathologist testified that he found numerous abrasions over the entire body of this child, with extensive amounts of blood coming from the nose and mouth areas. Three (3) severe wounds were found in the head area, two (2) on the right side and one (1) almost in the midline in the back of the head, indicating at least three (3) separate blows. The skull was extensively fractured resulting in numerous fragments of the skull becoming depressed directly into the brain. Multiple recent abrasions were found on the child's right arm and on her right chest area.

The pathologist was of the opinion that any of the three (3) separate blows would have been sufficient to cause death and that the child may have lived for at least an hour after the first blow but that she would have lost consciousness fairly rapidly.

The pathologist also testified that he visually observed extensive trauma to the genital area and that his autopsy revealed acute perforation of the hymen resulting in acute hemorrhaging from the hymenal area. The autopsy revealed numerous bleeding points in the lining of the vagina itself and the presence of five (5) cc's of seminal fluid within the vagina.

Although the defendant in his statement and in his testimony denied that the victim made any outcry while she was being sexually abused the Court rejects this testimony as being unbelievable and patently untrue and finds as a matter of common understanding and knowledge that a seven (7) year old virginal child would suffer excruciating pain as her vagina was being penetrated first by the defendant's finger and then by his adult penis.

The standard jury instructions define heinous as meaning extremely wicked or shockingly evil. Atrocious is defined as outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless. In the Court's experience of seven (7) years as an Assistant Prosecuting Attorney and six (6) months on the bench, I am not aware of a case where a defendant's conduct more clearly falls within the definition of heinous, atrocious, and cruel.

3. The other aggravating circumstances: F.S. 921.141(5)(a); 921.141(5)(b); 921.141(5)(c); 921.141(5)(e); 921.141(5)(f); 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving both the charge of first degree murder and the charge of sexual battery, the Court makes the following findings:

1. The defendant has no significant history of prior criminal activity. F.S. 921.141(6)(a), and this a mitigating factor.

2. As to F.S. 921.141(6)(b), there is no evidence that the capital crimes were committed while the defendant was under the influence of extreme mental or emotional disturbance. The defendant's mother testified that for several weeks prior to the crime the defendant had been using alcohol and marijuana extensively but the Court finds that this alcohol and marijuana usage do (sic) not result in extreme mental or emotional disturbance.

3. As to F.S. 921.141(6)(c), there is absolutely no evidence that the victim was a participant in the defendant's conduct or that she consented to the act.

4. As to F.S. 921.141(6)(d), the defendant attempted to establish by his testimony that he was merely an accomplice to these offenses and that his participation was relatively minor, however, he did "admit" to having sexual intercourse with this seven (7) year old child and as the Court has stated above, his testimony that this so called "Fat Boy" was an accomplice is rejected as being untrue.

5. As to F.S. 921.141(6)(e), there is no evidence that the defendant was under extreme duress or under the substantial domination of any person.

6. As to F.S. 921.141(6)(f), there is no believable evidence that the defendant lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of law was substantially impaired. On the contrary, the fact that the defendant sought to eliminate Toni Annette Wright because she would be in a position to identify him supports a finding that the defendant appreciated the criminality of his conduct.

7. As to F.S. 921.141(6)(g), the defendant was nineteen (19) years at the time of these offenses and his age is therefore, a mitigating circumstance. The Court notes, in passing, that as to sexual battery the legislature found that the age of the defendant was a factor to be taken into account in determining whether the sexual battery is a capital crime.

As to Count Two of the indictment wherein the defendant was convicted of sexual battery wherein the victim was eleven (11) years of age or younger and the defendant was over eighteen (18) years of age, the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony was especially heinous, atrocious and cruel. F.A. 921.141(5)(h). In support of this finding the Court readopts the findings contained in paragraph 2 above.

2. The other aggravating circumstances to-wit: F.S. 921.141(5)(a)(b)(c)(d)(e)(f)(g), are inapplicable to this charge.

The trial jury has rendered its advisory sentence to the Court recommending that a sentence of life imprisonment be imposed on the defendant as to each of these capital crimes. Our Florida Supreme Court has stated that the recommendation of the trial jury is to be accorded great weight by the trial judge but I perceive the law still to be that the recommendation of the trial jury is not binding on the trial judge and that I still have the awesome responsibility of making the ultimate determination of whether the aggravating circumstances do in fact outweigh any mitigating circumstances and accordingly whether the death penalty should be imposed. In the following cases the trial judge declined to follow the recommendation of the trial jury and the imposition of the death penalty was subsequently affirmed by the Florida Supreme Court: Hoy vs. State, 353 So.2d 826 (1977); Barclay vs. State, 343 So.2d 1266 (1977); Dobbert vs. State, 328 So.2d 433 (1976); Douglas vs. State, 328 So.2d 18 (1976); a case originating from this Circuit; Gardner vs. State, 313 So.2d 675 (1975); and, Sawyer vs. State, 313 So.2d 680 (1975). A review of the factual statements in these cases leads the Court to the conclusion that this defendant's conduct was at least equal to the conduct of the defendants in each of those capital cases.

It is the ultimate finding and determination of the Court that as to the charge of first degree murder, the aggravating circumstances substantially outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

As to the charge of sexual battery, the aggravating circumstances outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to the contrary notwithstanding.

Upon appeal the defendant says that he could not be convicted and sentenced for both the first-degree felony murder and the underlying felonies, sexual battery and burglary, relying upon the principles enunciated in Pinder v. State, 375 So.2d 836 (Fla. 1979). Pinder was a prosecution for first-degree murder, sexual battery and burglary. The Court commented that the jury could have found defendant guilty of first-degree murder only on the basis of evidence that the defendant killed the victim during the perpetration of the burglary or sexual battery, as there was no evidence of premeditation. Therefore, the Court held, defendant could not be convicted of felony murder and the underlying felony upon which the murder conviction was based.

If, in addition to the killing, the defendant commits more than one felony, only one of the felonies need be considered the underlying felony and the defendant may be convicted and sentenced for the other felonies. The Court relied upon Brown v. Ohio, 432 U.S. 161 (1977), and Harris v. Oklahoma, 433 U.S. 682 (1977).

In the case sub judice there was ample evidence from which the jury could have found premeditation. Although the defendant, at one point, declared that he did not intend to kill the victim; nevertheless, he also said that he dropped the concrete block on the victim "because she knowed me." He also stated that after the sexual battery he took a cement block, held it "a little higher than the waist- right here" and dropped it on the child. He did it again. This time he lifted it higher. He bent down to see if she was still alive and she was not.

If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. Green v. State, 93 Fla. 1076, 113 So. 121, 122 (1927). Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See Rhodes v. State, 104 Fla. 520, 140 So. 309, 310 (1932).

There being adequate proof of premeditation, the principles announced in Pinder are not applicable to this case.

Defendant also said that the offenses are not sufficiently distinguishable to permit the imposition of cumulative punishment. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of the facts which the other does not. Brown v. Ohio. Murder in the first degree

through premeditation requires proof of a fact not required in sexual battery: premeditated design to kill.

It is true, as asserted by defendant, that the double jeopardy clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969). In the absence of proof of premeditated design, this principle would be applicable to the case sub judice. The two offenses are sufficiently distinguishable so as to permit two convictions and two punishments.

Defendant also complained that the court improperly limited cross-examination of two state witnesses regarding their knowledge of defendant's non-violent nature. Witnesses Barnes and Hayes were friends of the defendant. Barnes testified as to activities of the defendant until 11:00 o'clock p.m. the night of the homicide. Hayes testified as to his activities until 2:00 o'clock a.m. the same night. On cross-examination the attorney for defendant asked Barnes if he found defendant "to be a quiet, non-violent person." On cross-examination counsel for defendant asked Hayes if he had known defendant "to get violent or anything like that." There were no facts elicited by the state upon direct examination relative to defendant's propensity for violence. It is true that cross-examination extends to the entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. Conwell v. State, 361 So.2d 148 (1978). However, the attempted cross-examination in the case sub judice was in no way relative to the direct examination of the witnesses. It was improper cross-examination.

In addition the question itself was improper. Defendant had a right to produce evidence of his non-violent character, but this is done through his own witnesses. In any event, he could only have elicited evidence of his general reputation in the community, not specific instances of non-violence. Prevatt v. State, 82 Fla. 284, 89 So. 807 (1921); Reddick v. State, 25 Fla. 112, 5 So. 704 (1889).

Defendant next contends that section 921.141, Florida Statutes (1977), is unconstitutional because it restricts the mitigating circumstances to be considered to those enumerated in the statute. He says this violates the Eighth and Fourteenth Amendments to the United States Constitution. This question was raised when defendant moved to dismiss or quash the indictment. Also he requested a jury instruction stating that mitigating circumstances which the jury could consider were not limited to those listed in the statute. The trial court denied the motion to dismiss or quash and also denied the requested instruction. The record does not show that the trial judge precluded defendant from offering any evidence of mitigation. The trial judge correctly ruled that the standard jury instructions adequately covered the instructions on mitigating circumstances.

Defendant argues that the death penalty statute is unconstitutional in light of Lockett v. Ohio, 438 U.S. 586 (1978), where the Supreme Court held that the limited range of mitigating circumstances which could be considered by the sentencer under the Ohio statute was incompatible with the Eighth and Fourteenth Amendments. The identical attack was made upon the Florida statute in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). There the Fifth Circuit held that the Florida statute as applied and construed by the Supreme Court of Florida conforms to the decision rendered in Lockett v. Ohio. In several cases this Court has recognized the relevance of non-enumerated mitigating circumstances and utilized them in determining the propriety of the sentence. See Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Messer v. State, 330 So.2d 137 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975). It is clearly established that all relevant evidence pertaining to the character of the defendant and

circumstances of the crime may be considered by the sentencer in Florida. Lockett does not invalidate our statute.

Defendant says the imposition of the death sentence upon him for the murder conviction, where he did not possess a purpose to cause the death of the victim, is unconstitutional. This assertion is without foundation in the record. There was sufficient proof of premeditation.

Section 794.011(2), Florida Statutes (1977), provides that whoever being eighteen years or older commits a sexual battery upon a person eleven years of age or younger, is guilty of a capital felony. The defendant was nineteen years of age at the time of the offense and his victim was seven years of age. In his motion to dismiss, defendant challenged the constitutionality of this statute, contending that punishment by death for the crime of sexual battery constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. By denying the motion to dismiss and imposing the death penalty, the trial court held that the statute was constitutional. This question has not been decided under present Florida law. We have recently considered sexual battery cases in which the penalty had been imposed, but we reduced the sentence to life imprisonment in both cases because of the particular circumstances. Purdy v. State, 343 So.2d 4 (Fla.), cert. denied, 434 U.S. 847 (1977); Huckaby v. State, 343 So.2d 29 (Fla.), cert. denied, 434 U.S. 920 (1977).

Coker v. Georgia, 433 U.S. 584 (1977), involved the sentencing of a man convicted of rape upon the verdict of a Georgia jury. The Georgia jury recommended the death penalty and the trial court imposed a death sentence. The Georgia Supreme Court affirmed. The Supreme Court of the United States held that the punishment of death for the rape of an adult woman violates the cruel and unusual punishment clause of the Eighth Amendment because it is grossly disproportionate and excessive in relation to the crime committed. The Court has yet to decide whether the same holds true for the rape of a child under eleven years of

age. In its plurality opinion (Justices White, Stewart, Blackmun, and Stevens) the Court noted that Georgia was the only state which authorized a sentence of death when the rape victim was an adult woman. Only two other jurisdictions (Florida and Mississippi) provided capital punishment when the victim was a child. It was then said in the opinion:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," Gregg v Georgia, 428 US, at 187, 49 L Ed 2d 859, 96 S Ct 2909, is an excessive penalty for the rapist who, as such, does not take human life.
>
> This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga Ann Code §26-3102 (1976 Supp); Gregg v Georgia, supra, at 165-166, 49 L Ed 2d 859, 96 S Ct 2909. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. Here, the first two of these aggravating circumstances were alleged and found by the jury.
>
> Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies--rape, murder, and kidnaping--but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

433 U.S. at 598-599 (footnotes omitted).

Justices Brennan and Marshall concurred in the judgment as each believed that the death penalty in all circumstances is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Justice Powell concurred in the judgment, but would not prejudge the issue of capital punishment in the

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case of an outrageous rape resulting in serious, lasting harm to the victim. Justice Burger and Rehnquist dissented. The reasoning of the justices in Coker v. Georgia compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.

We point out that section 782.04, Florida Statutes (1977), defines murder in the first degree as the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any sexual battery. Since the death sentence sub judice is sustained under the conviction of premeditated murder, the constitutionality of the statute imposing the death penalty for sexual battery becomes academic. Capital punishment can be inflicted only once.

The defendant says that the death sentence should be vacated in the murder conviction because there was no evidence to support the finding of the trial judge that the crime was heinous, atrocious, and cruel. Defendant refers us to State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), where we held that atrocious means outrageously wicked and vile and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Defendant insists that when the facts of this case are compared with previous decisions of this Court the findings of the trial judge cannot be upheld. He cites Halliwell v. State, 323 So.2d 557 (Fla. 1975). In Halliwell the killing arose from a love triangle in which defendant flew into a violent rage after the husband of the woman he loved had beaten her. It was an emotional type of homicide. However, hours later the defendant dismembered the body. We held that the dismemberment of the body after death was not relevant in fixing the death penalty. Since the dismemberment was not relevant, a killing

committed in an emotional rage was not heinous, atrocious, or cruel. In the case sub judice there was no emotional rage. The defendant kidnapped a seven-year-old child for the purpose of sexually abusing her and when he felt she could identify him, defendant proceeded to kill her with a cement block.

In Burch v. State, 343 So.2d 831 (Fla. 1977), cited by defendant, there was evidence that the defendant was mentally disturbed at the time of the offense. We held this to be a mitigating factor and that this factor was obviously considered by the jury in recommending life and improperly rejected by the trial judge. When this mitigating circumstance was weighed against the aggravating circumstances, the judge's rejection of the jury's recommendation was overturned by this Court. In Burch we did not say that the act was not especially heinous, atrocious, or cruel.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), the defendant and the victim shared a long-standing relationship which included severe and disabling beatings. Also, the victim had consented to the beatings which caused death. We held that the totality of circumstances and the weighing of mitigating and aggravating circumstances did not warrant the imposition of the death penalty on the defendant.

Jones v. State, 332 So.2d 615 (Fla. 1976), cited by defendant, resulted in the approval of the jury's recommendation of a life sentence because the defendant's mental illness was considered as a factor to be weighed.

The imposition of the death penalty was held to be proper in Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979), where the victim was kidnapped and held captive for twenty-four hours before being stabbed to death while tied, spread-eagled and helpless, on a bed, crying out and moaning as the stabbing continued.

Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976), involved a defendant twenty-seven years of age who was convicted of the murder of a thirteen-year-old

female. The victim's body was discovered lying atop a trash pile. She had been raped and shot to death, execution style. Her nude body was found blindfolded, with bullet wounds in her head, chest, back and arm. We upheld the death sentence and described the act as being especially heinous, atrocious, and cruel.

The homicides in Proffitt v. State, 315 So.2d 461 (Fla. 1975), aff'd. Proffitt v. Florida, 428 U.S. 242 (1976)(stabbing a man asleep in his bed), and Spinkellink v. State, 313 So.2d 666, (Fla 1975), cert. denied, 428 U.S. 911 (1976) (shooting a sleeping companion), were heinous, atrocious, and cruel. So the instant case certainly qualified as one which is heinous, atrocious and cruel. The mental anguish suffered by the victim preceeding the killing is a factor that may be considered in determining whether the act was especially heinous, atrocious, or cruel. Knight v. State, 338 So.2d 201 (Fla. 1976).

Defendant also cites, in support of his position, the case of Purdy v. State, 343 So.2d 4 (Fla.), cert. denied, 434 U.S. 847 (1977). Purdy involved a sexual battery on a child and the imposition of the death sentence was based primarily on the aggravating circumstance of heinous, atrocious, and cruel. We held that the evidence failed to show that the sexual battery of this child was especially aggravated under the terms of the death sentence law. We pointed out there was no evidence of physical abuse other than the sexual assault and the victim was not physically harmed. The case sub judice was more than a sexual assault. There was a kidnapping and physical harm which resulted in death. In Washington v. State we observed that the mental anguish experienced by a kidnapped victim awaiting eventual death bears upon the atrocity of the crime. This contention is without merit.

Defendant then contends that the trial court erred in not finding the additional mitigating factors which were present in the evidence. He complains that the trial court rejected the mitigating circumstances of extreme mental or emotional

disturbance or impaired mental capacity, discounting the effects of defendant's consumption of alcohol, drugs, and marijuana. Obviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol, drugs, and marijuana. In view of the testimony presented, the trial judge correctly rejected defendant's "drinking" and "drug use" as a mitigating factor. Jones v. State, 332 So.2d 615 (Fla. 1976), does not avail defendant because in Jones there was extensive psychiatric evidence to the effect that the defendant did not know the difference between right and wrong.

Defendant raises the possibility that he was a mere accomplice and that this theory was not considered by the trial judge. During the course of the investigation and during the trial, the defendant did attempt to implicate Fat Boy. This theory was rejected by the trial judge in weighing the evidence produced at the trial.

Defendant contends that the trial court committed error in rejecting the jury's recommendations of life imprisonment, relying upon Tedder v. State, 322 So.2d 908 (Fla. 1975). In Tedder we pointed out that the recommendation of the jury should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

In Malloy v. State, 382 So.2d 1190 (Fla. 1979), the Court said:

> We have repeatedly stated that in reviewing the propriety of a death sentence, this Court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendation. Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation.

Id. at 1193. (Citations omitted.)

If defendant's testimony were accepted as creating a reasonable doubt, he should not be found guilty of murder in the first degree for his participation in the murder would not be proved. Defendant said he was leaving the scene, turned around when the victim screamed, and saw Fat Boy drop a concrete block on her head.

A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

This case is unlike Neary v. State, 384 So.2d 881 (Fla. 1980), where an accomplice receiving lesser punishment played a significant role in the perpetration of the criminal act. Here the defendant committed the murder or Fat Boy did it. This question was settled by the verdict of guilty.

The trial court reviewed other cases where this Court has affirmed the death penalty after a recommendation by the jury of life imprisonment. The trial judge made a specific finding that defendant's actions in the case sub judice at least equaled the conduct in those cases. This finding is supported by the evidence. Consequently, it comes to this Court with the presumption of correctness.

In Roy v. State, 353 So.2d 826 (Fla. 1977), cert. denied 439 U.S. 920 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied 439 U.S. 892 (1978); Dobbert v. State, 328 So.2d 433 (Fla. 1976), aff'd, 432 U.S. 282 (1977); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976); and Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, U.S. 911 (1976), this Court found compelling reasons to reject the jury's recommendations.

Unquestionably the Court in each of these cases was swayed by the extreme heinousness and atrociousness of the crimes. So was the trial court in the instant case. In all of the above cases, with the exception of Dobbert, the victim was an adult.

Here it was a seven-year-old child. She had been kidnapped, subjected not only to sexual abuse, but to the anguish of perceiving that she was about to have her head crushed, and this mental anguish bears on the atrocity of the crime. Washington v. State. The trial judge exercised a reasoned judgment, and the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ.

The trial judge was not required to request a presentence investigation before sentencing the defendant. Hargrave v. State, 366 So.2d 1 (Fla.), cert. denied, 444 U.S. 919 (1979); Thompson v. State, 328 So.2d 1 (Fla. 1976).

The sentence of death imposed for conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the Court has no discretion. Sufficient factors are present in this case to create an exception to Florida Rule of Criminal Procedure 3.180 requiring the presence of defendant at sentencing. See Anderson v. State, 267 So.2d 8 (Fla. 1972). The defendant, for the crime of sexual battery upon a child under eleven years of age, shall be imprisoned for life, with no eligibility for parole during the first twenty-five years.

We have carefully reviewed the evidence in this case and find that the judgments of guilt and the sentence of death for murder, as well as the sentence to a term of years, were appropriate. These judgments and sentences of the trial judge are therefore affirmed.

SUNDBERG, C.J., BOYD, OVERTON and ALDERMAN, JJ., Concur
ENGLAND, J., Concurs as to the conviction and dissents as to the sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Polk County,

William A. Norris, Jr., Judge - Case No. CF77-2715

Jack O. Johnson, Public Defender, and James R. Wulchak and Douglas A. Lockwood, Assistant Public Defenders, Bartow, Florida,

for Appellant

Jim Smith, Attorney General, and Charles Corces, Jr. and Richard G. Pippinger, Assistant Attorneys General, Tampa, Florida,

for Appellee

Supreme Court of Florida

WEDNESDAY, OCTOBER 14, 1981

ROBERT LEWIS BUFORD, **

Appellant, **

**

vs. ** CASE NO. 54,010

** CIRCUIT COURT CASE NO. CF77-2715
(Polk County)

STATE OF FLORIDA, **

Appellee. **

**

Upon consideration of the Motion for Rehearing filed by attorney for Appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Hon. E. D. "Bud" Dixon, Clerk
Hon. William A. Norris, Jr., Judg
W. C. McLain, Esquire
Hon. Jim Smith, Attorney General

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SECTION 921.141, FLORIDA STATUTES (1977)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period ~~not~~ to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

ROBERT BUFORD,
Defendant.

CASE NO. 77-2715

DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTION - PENALTY #2

The aggravating circumstances which you may consider are limited to those upon which I have just instructed you. However, there is no such limitation upon the mitigating factors which you may consider.

Fla. Stat. Sec. 921.141 (5,6)/

Profitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 922 Fn 8, (1976) (plurality opinion).

Cf. Jurek v. Texas, 428 U.S. 262, 49 L.Ed. 2d 929, 938 (1976) (plurality opinion).

Cf. Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed. 2d 974, 982 (1976) (plurality opinion).

Cf. Woodson v. North Carolina, 428 U.S. 328, 49 L.Ed. 2d 944, 961 (1976) (plurality opinion).

Cf. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

Elledge v. State, 346 So.2d 998 (Fla. 1977), Case No. 48,031, Opinion filed April 7, 1977, Slip Opinion at 6.

Respectfully submitted,

FREDERICK E. MEPLOGLE
Assistant Public Defender

GRANTED _____ DENIED ✓

WILLIAM A. NORRIS, Jr.
Circuit Judge

FILED AND RECORDED
BOOK 54 PAGE 264
MAR 30 1978
E. D. "RUDY" DIXON, Clerk
BY _____

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it in the record. I am filing the original.

MR. REPLOGLE: Thank you, Judge.

THE COURT: All right, number two?

MR. REPLOGLE: Your Honor, I would request instruction number two which would advise the jury that aggravating circumstances are limited to those enumerated in the statute, since the statutory language is, "aggravating circumstances shall be limited to the following:" and then it enumerates (a) through (h) as aggravating circumstances. However, the mitigating circumstances, the statutory language is, "mitigating circumstances shall be the following:" and that the jury be instructed that mitigating circumstances may not necessarily be based strictly on (a) through (g) of the statute, but may include anything of a mitigating type nature in the case even though it may not come under the strict heading of the ones in the statutes.

THE COURT: Mr. Replogle, do you have a specific case that actually says that? The majority holding of the Supreme Court?

MR. REPLOGLE: Your Honor, with me presently no, I do not. I don't know if there is a case that holds that way.

THE COURT: I'm going to deny that also on the grounds I think it's adequately covered by the standard jury instructions and I will file that in the official records of the court. Number three?

MR. REPLOGLE: Your Honor, I would request instruction number three to advise the jury that the death penalty is not a requirement in every case where there has been the taking of a life by another person or in this case, also, by the commission of a sexual battery upon someone under the age of eleven years of age. And instructing the jury that they are to use their sound judgment and to what

case that you have no regrets about it; that it be one that was the right decision whichever way the verdict is or the recommedation, be the one that was the right one in this case -- the one that was the fairest.

I would ask that in this, which is basically our season of forgiveness of sins and renewal of faith, that you forgive this man what he has done, and in short I'm asking you that you spare in your recommendation Robert Buford's life. That the penalty that he will suffer with a life recommendation is the one that would be best in this case.

Thank you.

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder and for his crime of sexual battery. As you have been told, the final decision as to what punishment shall be imposed is my sole responsibility. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination

as to whether sufficient aggravating circumcumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist as to each crime.

Your verdict as to each crime should be based upon the evidence which you have heard while trying the guilt or innocence of the defendant and evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following and may be established by the evidence:

(a) That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

(b) That at the time of the crime for which he was to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

(c) That the defendant in committing the crime for which he is to be sentenced knowingly created a great risk of death to many persons.

(d) That the crime for which the defendant is to be sentenced was committed

SYDNEY C. NEIL, CSR, RPR
OFFICIAL COURT REPORTER
TENTH JUDICIAL CIRCUIT
BARTOW, FLORIDA 33830

HALL OF JUSTICE BLDG.
813-533-3158

while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, arson, sexual battery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

( ) That the crime for which the defendis to be sentenced was committed for pecuniary gain.

(g) That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile. Cruel means designed to inflict a high degree of pain; utter indifference to or enjoyment of the suffering of others. Pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment. Should you find sufficient of

these aggravating circumstances to exist, it will then be your duty to determine whether such mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider if established by the evidence as these:

(a) That the defendant has no significant history of prior criminal activity.

(b) That the sentence for which the defendant is to -- excuse me. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) That the victim was a participant in the defendant's conduct or consented to the act.

(d) That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor.

(e) That the defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well-satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find

them from the evidence and the law as given you by the Court. Your verdict as to each crime must be based upon your finding of whether aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death as to each crime.

In these proceedings it is not necessary that the verdict of the jury be unanimous; but a verdict may be rendered upon the finding of a majority of the jury -- that is, seven of your number. The fact that the determination of whether or not a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot, but that should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence -- all of it -- realizing that human life is at stake, and bring to bear your best judgment upon the sole

"A majority of the jury advise and recommend to the Court that it impose a life sentence or sentence of life imprisonment upon the defendant for the crime of sexual battery."

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment. And I want to reemphasize to you that you must consider each of these crimes separately. You will now retire to consider your recommendation; and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation which will be provided to you with these written instructions should be signed by your foreman and returned to the Court.

All right, members of the jury, you may now further retire for your deliberations. All rise.

(The jury retired to deliberate at 5:21 p.m.)

JURY OUT:

THE COURT: All right, please be seated. All right, Mr. Replogle,

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for ROBERT LEWIS BUFORD, the Cross-Petitioner, hereby certify that on December 7, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Cross Petition For Writ Of Certiorari To The Supreme Court Of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, the Cross-Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, Jr., Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: William C. McLain

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

issue which is submitted to you at this time.-- that is, whether or not a majority of your number recommend that the defendant be sentenced to death or to life imprisonment.

Should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows: Quote "A majority of the jury advise and recommend to the Court that it impose a death penalty upon the defendant for the crime of first degree murder." And as to the crime of sexual battery: "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant for the crime of sexual battery."

On the other hand, if after considering all the law and the evidence touching upon the issue of punishment a majority of the jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant for the crime of first degree murder." And as to the crime of sexual battery,

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Case No. 81-861 81 5855

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT LEWIS BUFORD,

Cross-Petitioner,

vs.

STATE OF FLORIDA,

Cross-Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Cross-Petitioner, ROBERT LEWIS BUFORD, asks leave to file the attached Cross Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Cross-Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

COUNSEL FOR CROSS-PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEWIS BUFORD, :

Cross-Petitioner, :

vs. : Case No. 81-5855

STATE OF FLORIDA, :

Cross-Respondent. :

:

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEWIS BUFORD, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on March 31, 1978, in the Circuit Court for Polk County, Florida, for first degree murder and sexual battery in a single jury trial.

2. I received a sentence of death for first degree murder and sexual battery and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my convictions and death sentences for murder. My death sentence for sexual battery was reversed to life imprisonment.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

R. L. Buford
ROBERT LEWIS BUFORD

Subscribed and sworn
to before me this
day of November, 1981.

Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 19, 1985

Opposition

FJL

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Case No. ~~81-5855~~ 81-5855

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

ROBERT LEWIS BUFORD

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

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OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via the cross petition is correctly reported at 403 So. 2d 943.

JURISDICTIONAL STATEMENT

Respondent accepts petitioner's statement of the case except to add that the jury ". . . recommended to the court that it impose a life sentence on both the murder and sexual battery convictions." See 403 So. 2d. at 946.

PRELIMINARY STATEMENT

A supplemental appendix submitted herewith will be referred to by the symbol "SA".

REASONS FOR DENYING THE CROSS PETITION

I. THIS ISSUE IS ESSENTIALLY MOOT INSOFAR AS PETITIONER IS CONCERNED.

Petitioner fails to point out that while the trial court may have refused his requested instructions to the effect that mitigating circumstances were not limited to those enumerated in the statute, the jury recommended life anyway. Consequently any constitutional error was harmless beyond a reasonable doubt. Chapman v. California 386 U.S. 18.

It was harmless beyond a reasonable doubt, not only because the jury had recommended life, but because the trial court, as the sentencing authority, in a detailed order, rejected the jury recommendation. In doing so the court specifically considered and rejected the non-statutory mitigating circumstances submitted by the defense at the sentencing phase of the trial. 403 So. 2d at 947 (A-6). On appeal the Supreme Court of Florida also

discussed petitioner's consumption of alcohol, drugs and marijuana and agreed that the sentencing authority had correctly rejected this as a mitigating circumstance in view of petitioner's detailed account of the crime. 403 So. 2d at 953 (A-15-16)

Consequently, even should the Court grant certiorari it would be deciding an issue peculiar to this case only; viz: whether under these circumstances it was constitutional error, not harmless beyond a reasonable doubt for the trial court to have failed to give the instructions.

II. THE DECISION OF THE SUPREME COURT OF FLORIDA RESTS ON AN ADEQUATE STATE GROUND.

As can be gleaned from a perusal of the Florida Supreme Court's opinion, only passing reference is made to the requested instruction. 403 So. 2d at 949 (A-10) This is because petitioner did not raise it as a separate and distinct issue on appeal. The issue that he did raise was that Florida's death penalty statute was unconstitutional because it restricts the mitigating circumstances. (SA-22-28) In his brief in the court below petitioner referred to the requested instruction only in support of his argument that the statute itself is unconstitutional. In Florida an issue not raised on appeal is deemed waived. Albritton v. State, 13 So. 955 (Fla. 1893), Blount v. State, 11 So. 547 (Fla. 1892).

If petitioner had raised the issue concerning the failure to give the requested instructions he would have been faced with a contemporaneous objection problem. In Florida no party may assign as error on appeal the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. Florida Rule Criminal Procedure 3.390 (d), Guarino v. State, 67 So. 2d 650 (Fla. 1953), Zuberi v. State, 343 So. 2d 664 (Fla. 1977).

The reasons for this rule and why the state has a legitimate state interest in its preservation is exemplified by the facts of this case. While counsel did request these instructions at the jury charge conference, this conference was held before petitioner's counsel presented any evidence at the sentencing phase of the trial. At the time the trial judge made his ruling he was not aware what evidence petitioner was going to present in mitigation- or even that he was going to present any. Once petitioner presented his evidence he should have requested the court to instruct the jury that they could consider the specific mitigating circumstance proffered. If he had done this then the trial judge could have focused his decision on whether to so instruct based on the evidence presented and guided the jury on what mitigating factors, other than those statutorily listed, petitioner was asking the jury to consider. Peek v. State, 395 So. 2d 492 (Fla. 1981). But petitioner did not do this. Instead, after the court denied the requested instructions, petitioner proceeded to present his evidence (SR-60). After he did so,the court instructed the jury (A-27). After the instructions the court asked counsel if there were any objections to the instructions and counsel responded: "no, sir". (SR-66-67)

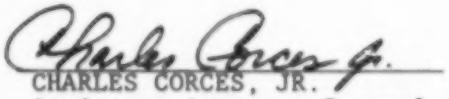
The purpose of Florida's contemporaneous objection rule with respect to instructions is to avoid "sandbagging" as occurred in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammel Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

ROBERT LEWIS BUFORD, :

Appellant, :

vs. : Case No. 54,010

STATE OF FLORIDA. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

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TAMPA, FLORIDA

INITIAL BRIEF OF APPELLANT

JACK O. JOHNSON
PUBLIC DEFENDER

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 North Carpenter Street
Bartow, Florida 33830

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

The appellant was charged by indictment with the offenses of first degree murder, capital sexual battery, and burglary with the intent to commit a sexual battery. (R13-16) Defense counsel filed a motion to dismiss the indictment alleging, inter alia, that the death penalty for the rape of a child constitutes cruel and unusual punishment and that the death penalty statute impermissibly limited the mitigating circumstances which may be considered. (R22-27) The trial court denied the motion. (R37,39)

Trial by jury commenced on March 27, 1978, before the Honorable William A. Norris, Jr., Judge of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County. (R52) Following defense counsel's motions for a judgment of acquittal, the jury found the appellant guilty on all three counts as charged. (R1105-1107)

Immediately after the jury returned its verdicts, the case proceeded into the penalty phase of the bifurcated trial. The jury recommended to the court that it impose life imprisonment on both the murder and sexual battery convictions. (R1108-1109) The following morning, the trial court overruled the jury's life recommendations and sentenced the appellant to the death penalty on the murder conviction, the death penalty on the sexual battery conviction, and fifteen years imprisonment on the burglary conviction, sentences to run consecutively. (R1149-1152)

The appellant's motion for a new trial, motion to mitigate or modify sentence, and motion for examination of the defendant as a mentally-disordered sex offender were denied by the trial court. (R1153-1155,1167-1169) Notice of appeal was timely filed. (R1170) This appeal follows.

STATEMENT OF THE FACTS

Early Sunday morning, November 6, 1977, at approximately 3:00 a.m., the appellant, Robert Lewis Buford, returned to his father's home where he was let inside by his sister, Annette Buford. (R450-451) Annette observed Robert breathing hard, as if he had just been running, and saw him carrying his T-shirt and tennis shoes. (R452-453) Robert appeared to have white oxydized paint on his bare back. (R453) He also appeared to be drunk. (R459,472)

Upon his entrance, Robert told his sister that if anyone came looking for him to say that he had been at home since 11:00 p.m. (R454) A few moments later, Robert broke down and stated that he might have killed a lady with a brick. (R455,469) Robert had started to implicate a person known as "Fat Boy," but immediately stopped, saying he was not going to involve anyone else. (R460,474-475)

Meanwhile, Lewis Wright, father of the victim, seven-year-old Toni Wright, awoke at 2:30 - 3:00 a.m. (R118) He had fallen asleep on the living room sofa while he and his children had been watching television. (R117) His children had fallen asleep on a pallet on the living room floor. (R111-112,174-175) Mr. Wright got up, turned the television off, and went to his bedroom. (R118-120) Mr. Wright did not notice if all of his children were still asleep on the pallet. (R122) On his way to the bedroom, he observed that the back door to the house was open. (R118) Since he had previously locked the door, Mr. Wright could not figure how the door had gotten open. (R119) He dismissed the open door, however, thinking that perhaps the children's grandmother had visited the house while he was asleep on the sofa and had exited through the back door. (R119-120).

At approximately 7:00 a.m., Mr. Wright again awoke. At this time, he noticed that Toni was missing. (R129) When Mr. Wright opened the front door to look for Toni, he discovered that a bicycle had been placed against the screen. The bicycle had not been there when he locked the door and could not have been placed there by someone inside the house (since the screen opened outward.) (R130,131)

Mr. Wright did not find Toni at any neighbors or relatives' houses. (R131-133) He returned to his house and discovered strange tennis shoe tracks and a child's bare footprints leading from his back door toward the New Jerusalem Church behind his house. (R132, 148-149) A further search of the house failed to uncover Toni, but Mr. Wright did notice that a bedroom window had been forced open from the outside and the screen pushed in. (R134-137)

Mr. Wright notified the police that his daughter was missing. (R139) Upon the arrival of the police, the body of Toni Wright was discovered behind the New Jerusalem Church. (R140-141,183) Toni Wright's body was lying on her back in a flower bed with her dress pulled up around her chest. Her underpants had been removed and were later found nearby. (R142-143) The police observed injuries to her head, with dried blood on her head and face. (R184-185,430) Pieces of a shattered concrete block with dried blood on them were near the body. (R142,184,186-187) There appeared to have been a struggle since a heavy stage-type platform had been partially moved. (R184) Also loose sand was scattered over the victim's dress and neck. (R443)

An autopsy revealed that the victim's skull had been fractured, resulting in bone fragments depressing into the brain. This type of injury was consistent with a concrete block striking

the head, possibly two or three times, (R432-435) Death resulted from the swelling of the brain caused by the fractures. (R435-436) Although death was not instantaneous (it could have taken from a few minutes up to an hour for death to occur), the victim lost consciousness very quickly. (R437-438,445) After losing consciousness, the victim would have felt no pain. (R445) The medical examiner further indicated that any one of the fractures would have been fatal and that the victim would not have been responsive after the first blow. (R437-438,444)

The autopsy of Toni Wright also revealed superficial abrasions on her right arm and chest. (R439) The hymen was ruptured, with "multiple superficial hemorrhage" in the lining of the vagina. (R439) A test run by the medical examiner on fluid recovered from inside the vagina indicated the presence of male semen, however, a test by a lab analyst with the Sanford Crime Lab on a vaginal swab showed no seminal fluid. (R440,629) The medical examiner also discovered two pubic hairs from the victim -- one from inside the vagina and another which was clinging to the victim's abdomen. (R441, 512-515) Only the hair found inside the vagina was submitted for comparison. (R641,648)

On Sunday, the day Toni's body was found, Robert was still at his father's house. With him were his sister, Annette, and Annette's boyfriend. To them, Robert appeared emotionally distraught over the incident. Annette saw Robert crying the morning following the incident. (R462) She did not know whether Robert was able to sleep the previous night. (R461) Robert was unable to eat breakfast that morning. (R473) Robert alternated between talk of leaving town and talk of turning himself over to the authorities. (R464,474)

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When Robert heard that his sister had spoken to the police and that the police wanted to talk to him, Robert voluntarily went to the police station. (R522,699-701)

At the station, the police placed the appellant under arrest for murder, sexual battery, and burglary. (R701) Detective Gerald Barlow read the appellant his constitutional rights and the appellant signed a written waiver of those rights. (R702-703) After he waived his rights, Robert blurted out, "I did it." (R704) Lieutenant Gene Nipper entered the interrogation room and Robert was again advised of his rights, which he again waived. (R704-708) The appellant told the police a version of the incident. This voluntary statement was tape-recorded by the police. (R708-709)

In his statement Robert Buford described an evening filled with excessive consumption of alcohol with his friends. (R715-717) The appellant thought he returned home and then left again to break into a house to steal something. (R717) According to the recorded statement, Robert broke into Mr. Wright's house through a back window. (R717-718) Upon entering through the window, he saw the girl lying there, picked her up, and carried her out the back door. (R718)

The appellant took Toni to the church area, had her lie down and had her remove her clothing. (R720) Robert removed his clothing and then inserted his finger into her vagina. (R727) He did not move his finger; he just put it in and later took it out. (R727) Meanwhile, according to his statement, Toni did not say anything; she did not cry, nor did she ask him to stop. (R727)

When Robert felt himself nearing climax, he had Toni place his penis in her vagina. (R727-728) The victim did not put the appellant's penis far into her vagina, rather "she just let the head

S A-11

lay on it." (R730) The appellant did not force his penis any further into her, and he ejaculated almost instantly. (R728-730)

Although Toni did not scream during the incident, she did struggle and pushed the appellant somewhat. (R728-729) Toni started screaming after the sex act. (R720) According to his statement, Robert became frightened and wanted to quiet Toni. To accomplish this, he picked up a concrete block which was nearby and dropped it twice on her head. (R721,732-734) When Robert bent down to check Toni, he saw that she was dead. (R721) He had not intended to kill her; he had only wanted to quiet her. (R725,732,734,737) Robert became so angry with himself for what he had done, he threw the concrete block to the ground in disgust. (R721,737) The appellant gathered his clothing and ran home crying. (R736-737)

After the appellant's statement was concluded, the police had the appellant sign a consent form to search his room at his father's house for the jeans he had been wearing on the night of the incident. (R741) These jeans were later recovered. (R585-586) A lab analysis of a blood spot on the jeans indicated that it was of the same type as the victim's blood. (R626)

Also following Robert's voluntary statement, Lieutenant Nipper advised the appellant that the police needed blood and hair samples from him. (R766) Robert consented and he was transported to Lakeland General Hospital's Emergency Room for police to obtain these samples. (R775) While waiting to give the samples, Robert began questioning the patrolmen who were guarding him as to the possibility of receiving the death penalty. (R773,776) The appellant told the officers that he was concerned about the electric chair because he had killed a girl. (R773,776) Robert reiterated that he

had not meant to kill her. (R777)

While the doctor was examining Buford and taking samples, the doctor was pointing out various cuts and scratches on the appellant's body. (R153-158) When the doctor was noting a set of scratches, Robert said, "Those were not made by the little one." (R163-164,484)

At trial, the appellant testified that although he had participated in the sexual battery, a man known as "Fat Boy" had raped and killed Toni. Robert related the events of the evening preceeding Toni's death. He and a few friends were drinking heavily, smoking marijuana, and popping pills (THC). (R787-795) He admitting being staggering drunk and feeling as if he had five feet and was walking up in the air. (R794-796)

The appellant left home at 2:00 - 3:00 a.m. to steal something. (R796) Outside, he met Darrell Lavon Wilson -- "Fat Boy." (R796-797) Fat Boy pushed Robert into Wright's yard, pulled open the window, and told Robert to go inside. (R797-798) Robert refused to climb inside since he knew the Wright family (they lived in the same neighborhood). (R809) Fat Boy proceeded to climb through the window while Robert stood outside. (R798) When Fat Boy did not return for a while, the appellant left. (R798)

A few minutes later, Robert met Fat Boy again; this time, Fat Boy was carrying Toni Wright. (R798) Upon questioning her, Toni said that she knew the appellant but did not know Fat Boy. (R798) Fat Boy carried Toni to the church area and commanded her to lie down. (R799) Robert admitted having sexual intercourse with Toni while Fat Boy watched. (R799) Toni did not scream while the appellant was on top of her since Robert did not try to force himself

far inside her. (R815-816)

Robert got dressed and was planning to leave when Fat Boy commenced sexual intercourse with Toni. (R799) Toni started screaming when Fat Boy penetrated deep into her vagina. (R799) Robert turned around to face them and saw Fat Boy drop a concrete block on the girl's head. (R799) Fat Boy picked up the brick to drop it again and Robert charged at him to prevent it. (R799-800,819-820) Fat Boy threw Robert against the wall and dropped the brick again. (R800, 816-817,820)

The two struggled in the dirt for a while, Robert finally getting the concrete block. (R800) He was going to throw it at Fat Boy, but instead smashed it to the ground in anger. (R800,820) Robert bent over Toni to feel her pulse and discovered that she was dead. (R800,820) The appellant told Fat Boy that she was dead and the two ran. (R800,821) Fat Boy followed Robert home but left when Robert refused to allow him to go home with him. (R800-801,821)

The police learned about Fat Boy and his alleged involvement in the incident from the appellant's sister long before the appellant's trial testimony. (R828) At deposition, Detective Nipper also stated that the appellant had told them about Fat Boy's involvement during their initial interview. (R835-836) Hair and blood samples were taken from Fat Boy and sent to the Sanford Crime Lab. (R632,653,830) Although the lab was supplied with plently of hair samples from the appellant, there was an insufficient number of hair samples from Fat Boy. (R653) Although the lab analyst reported to the Lakeland police that he needed more hair samples from Fat Boy, the police never furnished any additional samples. (R654,836-837) According to Detective Nipper, Fat Boy was eliminated as a suspect

since members of his family had given him an alibi. (R830)

At trial, the state called several long-time friends of the appellant to testify as to the events of the evening preceding the incident. During cross-examination, defense counsel sought to question these friends regarding the mild character and lack of violence of Robert. (R495,503) The trial court sustained the state's objections to the matter as being outside the scope of direct examination. (R495-496,503) Furthermore, the court severely chastised defense counsel when he sought to pursue these matters. (R503)

After deliberating for four hours, the jury questioned the court as to whether the indictment charged only premeditated murder. (R913-914) The jury also placed brackets around the segment of their written copy of the jury instructions which dealt with felony-murder. (R917,1069) The phrase "premeditated murder" on the jury's copy of the indictment was also underlined. (R13,917) The court instructed the jury, over defense counsel's objection, that the indictment could support a charge of felony murder as well as premeditated murder. (R917) After this question was answered, the jury reached its verdict in approximately ten minutes. (R918)

The jury found the appellant guilty of all three counts as charged and the trial proceeded into the penalty phase. Prior to additional evidence being submitted, defense counsel requested in writing that the jury be instructed that the mitigating circumstances which could be considered were not limited to those listed in the statute. (R933,1111) The trial court questioned defense counsel on any case law supporting this contention. (R934) Defense counsel admitted that he did not have any cases with him that so held, and the court denied the requested instruction. (R934)

The appellant's mother, Elizabeth Buford, testified during the penalty phase that her son had recently acquired a drug and alcohol problem. (R944) At times, Robert would not know who he was, who his mother was, or where he was. (R944-945) Elizabeth also testified that her son was not violent, but rather was a quiet person. Similarly, he was not known to become involved in fights or any other acts of violence. (R946)

The jury recommended that the appellant receive life sentences rather than capital punishment for his crimes. (R982-983,1108-1109) Notwithstanding these recommendations and without a pre-sentence investigation, the trial judge overruled the jury and sentenced Robert to die in the electric chair for both the murder and sexual battery convictions. (R1143-1148) As to the murder charge, the court found as aggravating circumstances: (1) that the murder was committed during a capital sexual battery; and (2) that the murder, occurring after a very painful sexual battery, was heinous, atrocious, and cruel, even though the victim lost consciousness fairly rapidly. (R1143-1145) The court found only the aggravating circumstance of heinous, atrocious, and cruel to support the death penalty on the sexual battery conviction. (R1147) As to the mitigating circumstances for both the murder and sexual battery charges, the court found: (1) no significant history of prior criminal activity; and (2) the appellant's age of nineteen years old. (R1146-1147) The court rejected the mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity, discounting the effects of the appellant's extensive consumption of alcohol, drugs, and marijuana. (R1146-1147)

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN CONVICTING AND PUNISHING THE APPELLANT FOR BOTH FIRST DEGREE FELONY-MURDER AND THE UNDERLYING FELONIES OF SEXUAL BATTERY AND BURGLARY IN VIOLATION OF THE DOUBLE JEOPARDY PROVISIONS OF THE FEDERAL AND FLORIDA CONSTITUTIONS.

The appellant was indicted for first-degree murder, sexual battery, and burglary. (R13-16) The state, at trial, presented evidence that the murder was committed during the course of a sexual battery; no evidence was presented to show premeditation. The court instructed the jury on both premeditated and felony murder. (R1068-1069) The jury found the appellant guilty as charged on all three counts of the indictment. (R1105-1107) In the absence of any evidence of premeditation, the verdict of guilty of first-degree murder could only have reflected a finding by the jury that the appellant was guilty of felony-murder. See Pinder v. State, ___ So.2d ___, 1978 FLW, DCA 1488 (Fla.2d DCA, Case No. 77-1527, decided October 18, 1978). Furthermore, where the jury asked the court whether the indictment would support a felony-murder charge and then returned shortly after this question was answered in the affirmative (R913-918), it appears that the jury must have found the appellant guilty on the basis of its conclusion that he had killed the victim while perpetrating one of the felonies listed in Section 782.04(1), Florida Statutes (1977). By convicting the appellant and sentencing him on both felony-murder and the underlying felonies, the trial court violated the proscription against double jeopardy.

In Brown v. Ohio, 432 U.S. 161 (1977), the petitioner

stole an automobile on November 29, 1973. On December 8, 1973, he was apprehended while driving the automobile in another town. The petitioner pleaded guilty to joyriding -- taking or operating the car without the owner's consent -- and was sentenced to 30 days in jail and a $100 fine. The petitioner was subsequently convicted for the theft of the automobile in the county from which he stole it and placed on probation for one year. The Ohio Court of Appeals affirmed the conviction for auto theft on the ground that the two prosecutions were based on separate acts of the petitioner because the theft did not occur on the same date as the joyriding, although the court found that every element of the crime of joyriding, was also an element of the crime of auto theft. The United States Supreme Court ruled:

> The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717; 23 L.Ed.2d 656; 89 S.Ct. 2072 (1969). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.....
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> * * *
>
> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304; 76 L.Ed. 306; 52 S.Ct. 180 (1932):
>
> > "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision

> requires proof of a fact which the other does not...." Brown v. Ohio, 432 U.S. at 165-166.

The Court reversed the petitioner's conviction for auto theft, holding that he was twice placed in jeopardy for the same offense even though the auto theft and joyriding offenses with which he was charged occurred on different dates. The court declared, at 433 U.S. at 169, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Nor is the Double Jeopardy Clause so fragile that prosecutors can avoid its limitations by dividing a single crime into separate units of felony murder and the underlying felony. In Harris v. Oklahoma, 433 U.S. 682 (1977), the petitioner was convicted of felony murder because his companion shot and killed a grocery store clerk during the course of a robbery. The petitioner was subsequently convicted of robbery with firearms for the same transaction. The United States Supreme Court reversed the robbery conviction, holding:

> When as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 682.

When Harris and Brown are read together, it is apparent that the double jeopardy clauses of the federal and Florida Constitutions bar cumulative punishment of the appellant for both felony murder and the underlying felonies of sexual battery and burglary. As found in Harris, felony-murder and the underlying felony are the same offense for purposes of the double jeopardy clauses. This is

so because, under the test announced in Brown, every element of the underlying felony must be proven in order to prove felony-murder.

The recent decision of the Second District Court of Appeal of Pinder v. State, ___ So.2d ___, 1978 FLW, DCA 1488 (Fla.2d DCA, Case No. 77-1527, decided October 18, 1978), is directly on point. In Pinder, the court followed Brown and Harris in ruling that conviction of both felony-murder and the underlying felony on which the murder conviction was based is improper. The Pinder court also held that Slater v. State, 316 So.2d 539 (Fla. 1975) and State v. Adams, 335 So.2d 801 (Fla. 1976), which were decided before Brown and Harris, were no longer controlling in light of the more recent United States Supreme Court cases.

The trial court committed reversible error by convicting and punishing the appellant for both first degree felony-murder and the underlying felonies of sexual battery and burglary. Therefore the judgments and sentences for sexual battery and burglary must be vacated.

ISSUE II

THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF STATE WITNESSES REGARDING THEIR KNOWLEDGE OF THE APPELLANT'S NON-VIOLENT NATURE.

Michael Barnes and Marshal Hayes, long-time friends of the appellant, were called by the state to testify to the appellant's actions on the evening preceding the incident. (R487,497,502) On cross-examination, defense counsel sought to question these witnesses as to whether they had ever known Robert to be a violent person. (R495,503) The court sustained the state's objection to these questions

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as being beyond the scope of direct examination, and chastised the defense for pursuing this area. (R495-496,503) By its curtailment of the appellant's fundamental right to cross-examination, the court committed reversible error.

In Coxwell v. State, 361 So.2d 148 (Fla. 1978), this Court reversed a first-degree murder conviction and sentence of death where cross-examination by the defense was limited merely because it went beyond the scope of direct examination. Citing Coco v. State, 62 So.2d 892, 895 (Fla. 1953), the Court stated that "cross-examination is not confined to the identical details testified to in chief...." Coxwell, 361 So. at 151. See also Brown v. State, 362 So.2d 437 (Fla.4th DCA 1978). The vitality of a "beyond the scope" objection has thus been severely limited, especially in a capital case.

Where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine witnesses, inquires of a prosecution witness regarding matters which are both germane to that witness' testimony on direct examination (here, knowledge of the appellant and his actions on the night in question) and plausibly relevant to a defense (to show, for example, that the defendant could not have killed the girl, or to show lack of intent), an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error. Coxwell, 361 So.2d at 152. In the present case it clearly did.

Here, as in Coxwell and Coco, the state's and court's narrow characterization of the scope of direct examination ignores the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accomodate to retain

vitality. The trial court abused its discretion in sustaining the state's objection. The court's curtailment of defense inquiry into a relevant matter at this point of the trial forestalled the development of a defense theory. As such, this limitation constituted a deprivation of the appellant's absolute and fundamental right to cross-examination, as guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 16, of the Florida Constitution. Reversal is mandated.

ISSUE III

SECTION 921.141, FLORIDA STATUTES RESTRICTS THE MITIGATING CIRCUMSTANCES TO BE CONSIDERED TO THOSE ENUMERATED IN THE STATUTE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The appellant moved to dismiss or quash the indictment filed against him, alleging that Florida's death penalty violated the Eighth and Fourteenth Amendments to the United States Constitution, specifically alleging that the statute impermissibly limited mitigating circumstances which could be considered. (R25) The trial court denied the motion. (R39) Additionally, defense counsel requested a jury instruction stating that mitigating circumstances which they could consider were not limited to those listed in the statute. (R933,1111) The trial court denied the requested instruction. (R934,1111)

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court condemned death penalty statutes which gave unbridled jury discretion to impose or recommend a death sentence. Such discretion rendered the statute unconstitutional in violation of the Eighth and Fourteenth Amendments. Florida's legislature

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passed this state's current death penalty statute to comply with the mandate of Furman. Discretion in imposition of the death penalty was to be controlled through the enumerated aggravating and mitigating circumstances. §921.141, Fla.Stat. The legislature intended to avoid arbitrariness in sentencing through restricting both the aggravating and mitigating circumstances to those enumerated in the statute. Cooper v. State, 336 So.2d 1133 (Fla. 1976).

The Court relied on the legislature's intent to hold in Cooper, supra, that the trial judge properly excluded non-statutory mitigating evidence. The ruling followed the legislative intent.

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). 7/
>
> 7/ The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6): (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist...." (Emphasis added.) This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

Cooper, at 1139.

From the above-quoted language, it is clear that this Court clearly held the list of statutory enumerated circumstances to be exclusive. Basic to the rationale for excluding Cooper's proffered mitigating evidence was this Court's conclusion that the legislature intended to limit mitigating circumstances to those enumerated. The above language is not mere dictum. A paragraph later this Court again reiterated the holding and interpretation of the statute:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list. Id. at 1139.

The first portion of the paragraph containing the above quotation does discuss evidence of Cooper's prior employment in terms of relevancy. But, this Court's reasoning for ruling it inadmissible rested on the interpretation of the statute, not the evidence's probative value. Since the evidence concerned Cooper's rehabilitation potential, which is not an enumerated mitigating circumstance, it was held inadmissible. As this Court unambiguously said, "....we are not free to expand the list." Id.

Concerning Cooper's proffered evidence of his co-defendant's temperament and of Cooper's attempts to avoid him, it is a correct conclusion that this Court held the evidence irrelevant to show the enumerated mitigating factor that Cooper acted under the domination of his co-defendant.

> Testimony regarding Ellis' temperament and Cooper's attempts to avoid Ellis on a few occasions reflected events and opinions too removed from the planning of the robbery and commission of the murder for there to be any rational basis on which the jury could conclude that Cooper acted under Ellis' domination. (Emphasis added.) Id.

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However, this supports appellant's contention that this Court was applying a restrictive interpretation on the mitigating factors listed in Section 921.141 Florida Statutes. Even though the evidence was not probative of the enumerated factor, it certainly remained mitigating evidence casting some light on Cooper's character. But this Court ruled it inadmissible.

The continuing vitality of Cooper is evidenced by the opinion of this Court in Hargrave v. State, ___ So.2d ___ (Fla.Sup. Ct. Case No. 48,135, opinion filed June 30, 1978), wherein the majority concluded that the defendant's psychological deficiencies did not provide "a sound basis for establishment of the statutory mitigating circumstances." (Slip opinion at 8).

The Ohio legislature adopted the same reasoning as the Florida legislature and this Court to conform that state's death penalty law to Furman. Mitigating evidence was limited to the statutorily enumerated mitigating circumstances. In the recent decision of Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973 (1978), the Supreme Court held the Ohio statute unconstitutional in violation of the Eighth and Fourteenth Amendments. Mentioning that the Ohio legislature limited the mitigating circumstances in response to Furman, a plurality of the Court held,

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, risk is unacceptable and incompatible with the commands of the Rights and Fourteenth Amendments.

* * *

> .The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendment. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, 57 L.Ed.2d at 990, 992.

The limitation of mitigating circumstances found in Section 921.141, Florida Statute likewise renders that statute unconstitutional. Lockett v. Ohio, supra. Appellant is aware that the United States Supreme Court upheld Florida's statute in Proffitt v. Florida, 428 U.S. 242 (1976). But, the Court labored under the mistaken belief that the mitigating circumstances listed in the statute were not exclusive. 1/ This is evident from a statement in the Lockett opinion,

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. Lockett v. Ohio, 57 L.Ed.2d at 991.

1/ Proffitt v. Florida, 428 U.S. 242,249 (1976) footnote 8:

> 8. In one case the Florida court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. Sawyer v. State, 313 So.2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be limited to the following [eight specified factors.]" §921.141(5) (Supp 1976-1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See §921.141(6) (Supp 1976-1977). See also n.14, infra.

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If the Court had realized the restrictive nature of the mitigating circumstances listed in Section 921.141, Florida Statutes, the decision in Proffitt v. Florida would have probably been different. However, the holding of Lockett now renders Florida's statute unconstitutional, and appellant's death sentence should be reduced to life.

The Supreme Court of Colorado has recently declared that state's death penalty statute unconstitutional on the basis of the Lockett decision. People v. District Court, ___ P.2d ___ (Colo. 1978, Case Nos. 27,963; 28,017; 28,049, decided October 23, 1978). The Colorado Supreme Court found the statute facially defective because it limited the mitigating circumstances that could be considered in the sentencing determination. Florida's death penalty statute is essentially the same as Colorado's recently stricken statute. This Court should follow Colorado's lead and likewise strike Florida's death penalty.

Appellant is aware that the Fifth Circuit Court of Appeal recently addressed this question in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). However, that court labored under the same invalid assumption as did the U.S. Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). The Fifth Circuit Court's decision consequently concluded it had no authority to overrule the U.S. Supreme Court.

It is important to note the language from Lockett, supra, that the Fifth Circuit Court cited, specifically said that the Proffitt Court "....assumed, in approving the statute, that the range or mitigating factors listed in the statute was not exclusive ...." (Emphasis added.) Spinkellink v. Wainwright, 578 F.2d at 621.

This is the critical oversight in the Circuit Court's reasoning.

Earlier in the Spinkellink decision, the Circuit Court made a conclusion about Florida's statute that directly supports the appellant's contention:

> The relevant statute, Fla.Stat.Ann. §921.141, ...requires that the sentencing proceeding be held before the trial jury, which is to reach its decision by a majority vote after considering whether there are sufficient statutorily-defined aggravating circumstances and, if so, whether sufficient statutorily-defined mitigating circumstances exist that outweigh the aggravating circumstances. (Emphasis added, footnote omitted.) Id. at 587, 588.

The Court's conclusion later in the opinion that mitigating circumstances were not limited certainly raises a question to the validity of the Court's reasoning.

The holding of the Supreme Court of the United States in Lockett v. Ohio, supra, renders Florida's death penalty statute unconstitutional in that the statute, as interpreted by this Court in Cooper v. State, supra; impermissibly limits mitigating circumstances to those enumerated in the statute. Reversal of the appellant's death sentence and a reduction of his sentence to life imprisonment is mandated.

ISSUE IV

THE IMPOSITION OF THE DEATH SENTENCE UPON THE APPELLANT FOR THE MURDER CONVICTION, WHERE THE APPELLANT DID NOT POSSESS A PURPOSE TO CAUSE THE DEATH OF THE VICTIM, IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I, SECTION 17, OF THE CONSTITUTION OF FLORIDA.

In the recognized death decisions of the United States Supreme Court in 1976, that Court rejected per se unreasonable

attacks on several states' death penalties. See e.g. Gregg v. Georgia, 428 U.S. 153 (1976). In so ruling, the Court held that:

> when a life has been taken deliberately by the offender, we cannot say that the punishment is unvariably disproportionate to the crime. Gregg v. Georgia, 426 U.S. at 187. (Emphasis added.)

In Woodson v. North Carolina, 428 U.S. 280, 305 n.40 (1976), the United States Supreme Court specifically reserved ruling on the issue of whether the taking of a defendant's life is a proportionate sanction where the killing with which he is charged was unintentional, or was committed by a co-perpetrator in the course of a felony murder.

The Supreme Court of the United States was recently faced with this precise issue in Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973 (1978). The opinion of the Court written by Chief Justice Burger, while not specifically ruling on this issue, did severely criticize the Ohio death penalty statute for not taking into account, as a mitigating factor, the lack of a specific intent to cause the death of the victim and the defendant's role in a felony-murder situtation. Lockett v. Ohio, 57 L.Ed.2d at 985, 988. Absence of direct proof that the defendant intended to cause the death of the victim is highly relevant in determining the appropriate penalty. Lockett v. Ohio, 57 L.Ed.2d at 992.

Three of the concurring Justices, although not able to agree on a single opinion, would have gone further than the Court's opinion to hold that the death penalty cannot be constitutionally imposed in a case such as Lockett where a defendant did not possess the intent to kill and/or was only vicariously involved in a felony-murder. Justice Blackmun opined that, although it was impossible to define "a convincing bright line rule such as was used in regard to

rape, Coker v. Georgia, 433 U.S. 584 (1977), to make workable a disproportionality approach" in a case such as Lockett, the sentencing authority should seriously consider a defendant's participation and the character of his mens rea. Lockett v. Ohio, 57 L.Ed.2d at 996-997 (Blackmun, J., concurring.).

Justices Marshall and White, on the other hand, would develop a per se unconstitutional rule where there was no intent to cause death and/or there existed only proof of a felony murder:

> When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren--even those who believe that the death penalty is not wholly inconsistent with the Constitution--can disagree that it must be vacated...The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, Weems v. United States, 217 U.S. 349 (1910); it makes no distinction between a wilful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. See State v. Lockett, 49 Ohio St.2d 48, 67 (1976) (dissenting opinion).
>
> Permitting imposition of the death penalty solely on proof of felony-murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other Members of the Court to join MR. JUSTICE BRENNAN and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," Trop v. Dulles, 356 U.S. 86, 101 (1959), embodied in the Eighth Amendment, by reference to state "legislative judgments," see Gregg v. Georgia, 428 U.S. 153, 175 (opinion of STEWART, POWELL, STEVENS, JJ.). Lockett v. Ohio, 57 L.Ed.2d at 999 (Marshall, J., concurring).

Justice White relied on the proportionality rule of Furman

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v. Georgia, 408 U.S. 238 (1972), and Coker v. Georgia, 433 U.S. 584 (1977), to support his holding that the penalty of death is grossly disproportionate to the severity of the crime where a defendant did not intend to cause the death of a victim:

> I nevertheless concur in the judgment of the Court reversing the imposition of the death sentences because I agree with the contention of the petitioner...that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.
>
> It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (?) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 433 U.S. 584, 592 (1977) (opinion of WHITE, J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim, the punishment of death violates both tests under the circumstances present here.
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> * * *
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> I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposiiton of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See Furman v. Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of a crime.
>
> The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as as deterrent to intentional murders--and that

debate rages on--its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition of death upon those who do not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis. See Furman, supra, 408 U.S., at 310 (WHITE, J., concurring).

Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment. Lockett v. Ohio, 57 L.Ed.2d at 1002-1003 (White, J., concurring). (Emphasis added.)

Applying this rationale to the instant case, it is clear that the imposition of the death sentence upon the appellant for the murder conviciton is constitutionally impermissible. This is true under either version of the homicide.

The evidence adduced at trial was contradictory as to who actually killed Toni Wright. Robert originally told his sister, Annette, that Fat Boy was involved, but changed his story in order to protect Fat Boy. (R460,474-475) In his taped confession, Robert stated that he was alone during the incident. (R733) In his trial testimony, Robert once again indicated that Fat Boy was involved and that, in fact, Fat Boy had been the killer. (R796-800,816-820) Although the police knew about Fat Boy, they failed to follow any leads pointing toward him as the murderer. (R653-654,828,835-837)

Because of this contradictory evidence, it cannot be demonstrated beyond a reasonable doubt that the appellant actually killed Toni or possessed any intent to kill her. As such, Robert Buford's participation in the killing was only in a felony-murder situation as an aider and abettor. As stated in the concurring

opinions of Lockett v. Ohio, supra, the death penalty in such an aider and abettor situation is unconstitutional.

Even if this Court rejects Robert's trial testimony pointing to Fat Boy as the killer (as the trial judge did), the evidence indicates conclusively that Robert did not intend to kill Toni. In his confession, Robert repeatedly stated that he had not meant to kill her, but that he had only intended to quiet her. (R725,732, 734,737,777)

At most, the evidence indicates a reckless disregard for life. But this degree of mens rea is not enough to justify the appellant's death penalty for murder. The concurring opinions of Lockett v. Ohio, supra, point out that the death penalty under such facts is grossly out of proportion to the severity of the crime and fails to make any measurable contribution to any goals of punishment, as is required by Furman and Coker. The death penalty may not be imposed consistently with the Eighth and Fourteenth Amendments without proof beyond a reasonable doubt that the defendant actually, physically "engaged in the conduct with the conscious purpose of producing death." See Lockett v. Ohio, 57 L.Ed.2d at 1003-1004 (White, J., concurring). The sentence of death imposed upon the appellant must be set aside.

ISSUE V

FLORIDA'S DEATH PENALTY FOR THE OFFENSE OF SEXUAL BATTERY BY AN ADULT UPON A CHILD IS UNCONSTITUTIONAL IN THAT IT PROVIDES FOR CRUEL AND UNUSUAL PUNISHMENT.

The appellant was charged with and found guilty of the commission of a sexual battery by an adult upon a child of eleven

years of age or under. Section 794.011(2), Florida Statutes (1977), provides that such offense is a capital felony, punishable under Sections 775.082(1) and 921.141, Florida Statutes (1977), by death in certain cases and by life imprisonment without the possibility of parole for 25 years.

In his motion to dismiss, the appellant challenged the constitutionality of Sections 794.011(2), 775.082(1) and 921.141, Florida Statutes (1977), contending that punishment by death for the crime of sexual battery constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the Constitution of the State of Florida. The trial court, overruling a jury recommendation of life imprisonment, sentenced Robert Buford to die in the electric chair for the sexual battery.

The appellant submits that Section 794.011(2), Florida Statutes (1977), and the penalty statutes which it incorporates unconstitutionally provide punishment by death for a crime not severe enough to warrant it. This question has not been decided under present Florida law. 2/

2/ Cases decided applying the former rape statutes, e.g. Fla.Stat. §794.01 (1973), are no longer relevant both because the definition of what constitutes cruel and unusual punishment requires frequent re-evaluation, Gregg v. Georgia, 428 U.S. 153, 173 (1976), and because of the decision in Furman v. Georgia, 408 U.S. 238 (1972). See Chaney v. State, 267 So.2d 65 (Fla. 1972), in which this court declined to consider the same issue raised in this brief since the applicable death penalty had been invalidated under Furman.

This court has recently had before it sexual battery cases in which the death penalty had been imposed. However, this court reduced the sentences to life imprisonment in both cases because of the particular circumstances. Purdy v. State, 343 So.2d 4 (Fla. 1977); Huckaby v. State, 343 So.2d 29 (Fla. 1977).

Coker v. Georgia, 433 U.S. 584 (1977), involved the sentencing of a man convicted of rape upon the verdict of a Georgia jury. Georgia law gives the jury sole responsibility of determining whether a person guilty of a capital offense should be sentenced to death or to life imprisonment. [3/] The Georgia jury found that the defendant Coker's offense involved two of the aggravating circumstances outlined in the Georgia statutes and recommended that Coker be sentenced to death. The trial court imposed the death sentence and the Georgia Supreme Court affirmed. [4/] In Coker v. Georgia, supra, the United States Supreme Court reversed the judgment of the Georgia Supreme Court.

The majority opinion in Coker, written by Justice White and joined in by Justices Stewart, Blackmun, and Stevens, held that death is an unconstitutionally excessive punishment for the rape of an adult woman. Justices Brennan and Marshall concurred, expressing their opinion that the death penalty in any circumstance is cruel and unusual punishment. Coker v. Georgia, 433 U.S. at 600-601. Justice Powell concurred in part and dissented in part. Justices Burger and Rehnquist dissented.

The majority opinion in Coker specifically limited the Court's holding to the unconstitutionality of punishment by death for the rape of an adult woman. Although Justice White's opinion twice mentions Florida's "child rape" statute, the court declined to enter a specific opinion as to the constitutionality of that law.

3/ Ga. Code Ann - §§26-3102, 27-2302, and 27-2534.1 (1976 supp) The United States Supreme Court upheld the revised Georgia death penalty procedures in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976).

4/ For the Georgia Supreme Court standard of review of death penalty cases see Ga. Code Ann. §27-2537 (1976 supp).

The restraint shown in the opinion of the majority in Coker is an example of the United States Supreme Court's long-standing and self-imposed tradition of passing finally on only those constitutional issues presented by the facts of the case before it. 5/ However, the language of the majority opinion explaining the rationale for the Court's holding provides a clear indication of the constitutionality of punishment by death for other types of sexual offenses.

Justice White's opinion explained that punishment may violate the Eighth and Fourteenth Amendments by either being "barbaric" or by being "excessive" in relation to the crime committed. 6/ Punishment is unconstitutionally "excessive" if it either:

> (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Coker v. Georgia, 433 U.S. at 592.

See also Gregg v. Georgia, 428 U.S. at 173.

In finding in Coker that the death penalty was excessive in relation to the offense, the Court first looked to the values held in contemporary society, and secondly evalutated the nature of the offense of rape.

The Eighth Amendment prohibition against cruel and unusual punishment is not a static concept and "must draw its meaning from

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5/ See e.g., Bowen v. United States, 422 U.S. 916, 920 (1975); United States v. Raines, 362 U.S. 17, 21 (1960); Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J. concurring).

6/ Citing Gregg v. Georgia, supra; Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); Gregg v. Georgia, 428 U.S. at 173.

In Gregg, the Court continued at 173:

> Thus, an assessment of contemporary values concerning an infliction of a challenged sanction is relevent to the application of the Eighth Amendment.

The Court further explained in Gregg that the assessment is to be an objective judgment, and that the public attitude is important though not conclusive in the determination of what penalties offend common decency.

The United States Supreme Court's assessment of contemporary values in Coker concluded that death is no longer considered an acceptable punishment for rape. The Court's survey found that since the decision of Furman v. Georgia, 408 U.S. 238 (1972), few states have reinstituted the death penalty for rape. The majority concluded with respect to this finding:

> The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman. Coker v. Georgia, 433 U.S. at 596.

The Court's survey permits the same conclusion regarding punishment by death for rape regardless of the victim's age. The majority opinion noted that, besides Georgia, only Florida, Mississippi and Tennessee provide death as punishment for sexual offenses,[7/] those three states authorizing death for the adult rapist of a child victim. Coker v. Georgia, 433 U.S. at 595. Tennessee's statute

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7/ Fla.Stat. §794.011(2) (1975); Miss.Code Ann. §97-3-65 (1974); Tenn.Code Ann. 39-3702 (1974).

has been invalidated, Collins v. State, 550 S.W.2d 643 (Tenn. 1977), leaving only Florida and Mississippi with such statutes. The fact that only two states now authorize the death penalty for any type of sexual offense is an objective measure of contemporary societal values of the kind relied upon by Coker court. As in Coker, such a plain measure must weigh "very heavily" toward a determination that death is an excessive punishment for all sexual offenses.

Besides assessing public opinion, the United States Supreme Court in Coker also evaluated the nature of rape to determine if the death penalty is disproportional to the severity of the offense. While Justice White's majority opinion calls rape the "ultimate violation of self," short of homicide, [8/] the Court concluded, however, that despite the serious nature of rape, it cannot be classified with life and death matters. The following language of the majority opinion epitomizes the Court's rationale in rejecting the death penalty in Coker:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity

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8/ Coker v. Georgia, 433 U.S. at 597-598:

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

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> and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist if no more than that, does not. Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," 428 U.S. 187, is an excessive penalty for the rapist who, as such, does not take human life. Coker v. Georgia, 433 U.S. at 598.

Significantly, the above paragraph does not speak only of rape "of an adult woman," as does much of the opinion. The majority in Coker restricted its formal holding, but in explaining the reasoning and constitutional basis for the holding the majority opinion discloses the broader premise that death is unconstitutionally excessive punishment for all rape. The Court has thereby indicated that the Consitution does not permit execution as punishment for rape, regardless of the victim's age.

In their opinions in Coker, the dissenting members of the Unites States Supreme Court lament that the majority chose to enter its opinion in reference to all rape generally. Justice Powell, dissenting in part, says:

> Today, in a case that does not require such an expansive pronouncement, the plurality draws a bright line between murder and all rapes -- regardless of the degree of brutality of the rape or the effect upon the victim. Coker v. Georgia, 433 U.S. at 603.

Justice Burger, joined by Justice Rehnquist, sums up the issue thus:

> The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. Coker v. Georgia, 433 U.S. at 621.

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The appellant submits that the "clear implication" put forth in Coker by the ultimate interpreter of the United States Constitution is dispositive of this point on appeal. As demonstrated by contemporary social values and relative to the severity of the offense, death is an excessive punishment for rape or sexual battery, regardless of the age of the victim. The appellant's death sentence for sexual battery is unconstitutional, it must be reversed.

ISSUE VI

THE SENTENCES OF DEATH IMPOSED UPON THE APPELLANT ARE NOT JUSTIFIED WHERE THE PENALTIES WERE BASED ON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, WHERE ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND WHERE THE MITIGATING FACTORS OUTWEIGH THE PROPER AGGRAVATING FACTORS.

The trial court overruled the jury's life recommendations and sentenced Robert Buford to die for both the murder and sexual battery convictions. (R982-983,1108-1109,1143-1148) As to the murder charge, the court found two aggravating circumstances: (1) that the murder was committed during a capital sexual battery; and (2) that the murder was heinous, atrocious, and cruel. (R1143-1145) The trial court found only the aggravating circumstance of heinous, atrocious, and cruel to support its sentence of death upon the appellant for the sexual battery conviction. (R1147) The mitigating circumstances found by the judge as to both the murder and sexual battery convictions were: (1) no significant history of prior criminal activity; and (2) Robert's age of nineteen years old. (R1146-1147)

Both death sentences imposed upon Robert Buford must be vacated. The trial court found improper aggravating circumstances

and failed to consider relevant additional mitigating factors. A proper weighing of these circumstances, especially in light of the jury's recommendations of life imprisonment, should have resulted in a life sentence.

A.

The Trial Court Erred In Finding The Inappropriate Aggravating Circumstance Of Heinous, Atrocious, And Cruel To Support Its Sentence On The Murder Conviction.

This Court defined the aggravating circumstance of "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), this court further refined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes especially heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. (Emphasis added.) State v. Dixon, 283 So. 2d at 9.

Following the above definition, the facts of the murder sub judice fail to support a finding of this circumstance. It is

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true that death in the instant case was not instantaneous (death occurred from within a few minutes up to an hour after the first blow). (R437) However, the medical examiner testified, Toni Wright did lose consciousness almost instantaneously. (R438,444-445) After losing consciousness, she felt no pain whatsoever. (R438,444-445) Therefore, the murder was not "unnecessarily torturous to the victim" as is required by Dixon and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great." State v. Dixon, So.2d at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977). A comparison to other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976)

(38 "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972).

To support his finding that the murder was heinous, atrocious, and cruel, the trial judge described in great detail the facts and injuries of the sexual battery. (R1143-1145) These facts and injuries do not rise to the level of "heinous, atrocious, and cruel" (See Argument VI B, infra). But even if they do, they should be applied only to the sentence on the sexual battery conviction, not to the sentence on the murder conviction. To do so would amount to double punishment for the sexual battery (See Argument I, supra).

The appellant's death sentence for the murder cannot be based upon this finding. Since mitigating circumstances were present, this Court must vacate the sentence of death for the murder charge, and at least remand the case for resentencing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

B.

The Trial Court Erred In Finding That The Sexual Battery Was Heinous, Atrocious, And Cruel.

The trial judge, again rejecting the jury's recommendation, sentenced the appellant to death on the sexual battery conviction, finding only that the sexual battery was heinous, atrocious, and cruel.

(R1144-1145,1147) To support this finding, the court listed the injuries to the girl's vagina:

> The pathologist also testified that he visually observed extensive trauma to the genital area and that his autopsy revealed accute perforation of the hymen resulting in accute hemorrhaging from the hymenal area. The autopsy revealed numerous bleeding points in the lining of the vagina itself and the presence of five (5) cc's of seminal fluid within the vagina.
>
> Although the defendant in his statement and in his testimony denied that the victim made any outcry while she was being sexually abused the Court rejects this testimony as being unbelievable and patently untrue and finds as a matter of common understanding and knowledge that a seven (7) year old virginal child would suffer excruciating pain as her vagina was being penetrated first by the defendant's finger and then by his adult penis. (R1145)

The finding of this aggravating circumstance was erroneous. While it is recognized that all sexual batteries on children are to some extent heinous, the facts of the instant sexual battery do not establish that the crime was "especially heinous" as is required. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

The only testimony regarding the specific events surrounding the sexual battery came from the appellant in his confession to police and in his trial testimony. According to his confession, Robert Buford never forcibly or violently penetrated the victim's vagina with his penis. He first inserted his finger into her vagina. (R727) The insertion of his finger would have caused the perforation of the hymen and could very well have resulted in the superficial hemorrhage of the vaginal lining, the only injuries to the genital area. (R439-440) When Robert felt himself nearing climax and wanted Toni to place his penis inside her vagina, she merely placed his penis on her genital area. (R727-728,730) He did not attempt to

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force himself inside her to any great degree. (R730) Therefore, the circumstances of the sexual battery were not such as to set the crime apart from the norm of capital sexual battery. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). There was no showing of torture; the crime was not outrageously vile or wicked (above and beyond the norm).

The appellant submits that the vaginal injuries occurring as a result of the sexual battery were such as would occur in any sexual battery upon a virgin child. The case of Purdy v. State, 343 So.2d 4 (Fla. 1977), involved a sexual battery on a child with similar vaginal injuries as found in the instant case (plus Purdy involved anal injuries as a result of additional, anal intercourse).[9/] Purdy v. State, 343 So.2d at 6, n.2. In reversing Purdy's death sentence for sexual battery based solely on this aggravating circumstance of heinous, atrocious, and cruel, this Court held that "The findings and the evidence do not show how this involuntary sexual battery of a child not more than eleven years of age was especially aggravated under the terms of the death sentence law." Purdy v. State, 343 So.2d at 6.

The Purdy Court went on to hold that the imposition of the death penalty on the sole basis of the type of injury occurring automatically with the perpetration of the crime would render the statute unconstitutional as a mandatory death penalty:

> Unquestionably, the crime is a heinous offense ....Nevertheless, to affirm the death penalty

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9/ The victim in Purdy, admittedly, was not killed. However, the fact of the murder in the instant case should not enter into consideration into the heinousness of the sexual battery charge since such fact is the subject of a separate conviction and death sentence.

> in this instance would mean imposition of the death penalty for all individuals convicted of this crime. Recent decisions of the United States Supreme Court have held such practices to be unconstitutional. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). We must, under these circumstances, direct his sentence be reduced to life imprisonment. Purdy v. State, 343 So.2d at 6-7.

Likewise, the instant appellant's death sentence for sexual battery must be vacated.

C.

Additional Mitigating Factors, Not Found By The Trial Court, Were Present.

The trial court found as mitigating circumstances for both sentences: (1) no significant history of prior criminal activity; and (2) the appellant's age of nineteen years old. (R1146-1147) The court rejected the mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity, discounting the effects of the appellant's extensive consumption of alcohol, drugs, and marijuana. (R1146-1147) Additionally, the trial judge totally rejected the appellant's trial testimony and his prior statement concerning the participation of "Fat Boy" and, as a result failed to find that the appellant was merely an accomplice and his participation was relatively minor. (R1146)

These mitigating circumstances plus other, nonenumerated factors should have been found by the trial judge. Had they been properly found, the weighing process should have resulted in sentences of life imprisonment, as the jury had recommended.

First, the trial judge erred in failing to find a mitigating

circumstance based upon the appellant's impaired mental state at the time of the crime induced by the consumption of an unusually large amount of alcohol, marijuana, and drugs. The record shows by uncontraverted evidence that Robert had been drinking alcohol and smoking marijuana all evening prior to the incident. (R459,472, 489-499,502,506,715-717,787-795) Additionally, the appellant took some THC late that night. (R795-796) Robert was staggering drunk and felt as if he had five feet and was walking in air. (R794-796) Robert's mother, Elizabeth Buford testified that her son had recently acquired a drug and alcohol problem. (R944) She related instances when Robert would not know who he was, who his mother was, or where he was. (R944-945)

Because of the appellant's severe drug and alcohol problems and excessive consumption on the night of the incident, the appellant suffered from an impaired mental state at the time of the incident. §921.141(6)(f) Fla.Stat. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted this mitigating circumstance, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance....Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

As Justice Ervin noted in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975) (death sentence later reversed by the United States Supreme Court and, upon remand, the defendant was resentenced to life imprisonment), the more enlightened perspective on alcoholism and drug abuse is that they are no longer considered simply emotional weaknesses, but rather forms of diseases,

which, like other physical and mental ailments, can cause aberrant behavior and require treatment. This conclusion is supported by the facts of the instant case. Robert Buford was normally a very quiet, nice person who was never known to be violent. (R502,946) But, under the influence of alcohol and drugs, Robert suffered severe mental impairment. As opined by one court-appointed psychiatrist:

> He manifests a personality disorder of mixed type, with antisocial trends, alcohol and drug abuse, sexually deviated trends (pedophilia) and, most important, such as lack of impulse control and lack of feeling for others, at least when under the influence of alcohol, as to render possible his commission of the offenses with which he is charged. (Emphasis added.) (R44)

It is admitted that Robert's mental condition attributable to alcohol and drugs is not sufficient to excuse him from criminal liability. As noted in State v. Dixon, 283 So.2d at 10, even in the presence of this mitigating circumstance, a person is still legally answerable for his actions. However, based upon the facts of this case, including the foregoing medical report, Robert's alcohol and drug-induced mental impairment is a mitigating circumstance to be considered and weighed against any aggravating factors.

Furthermore, Robert's conduct subsequent to the incident, especially his failure to attempt to leave the state and his signs of remorse, is consistent with his temporary mental impairment on the night of the incident. The finding of this mitigating circumstance is mandated.

Similarly, the alcohol and drug abuse, when coupled with other personality disorders noted in the psychiatric report (R44), give rise to the mitigating circumstance of mental or emotional disturbance. See Jones v. State, 332 So.2d 615 (Fla. 1976). In

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Jones, wherein evidence indicated the defendant consumed large amounts of alcohol, this Court approved of this mitigating circumstance, stating that"extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment." Jones v. State, 332 So.2d at 619. See also State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). The result in Jones should be applied to the instant case.

Third, although rejected by the trial judge, there was substantial testimony that the appellant was a mere accomplice to the murder, whose participation in it was relatively minor. Robert's trial testimony related that he accompanied Fat Boy to the church area. (R798-799) There after sexually assaulting the victim, Fat Boy smashed the girl's head with a concrete block. (R799-800,819-820) Robert attempted to stop the murder but did not succeed. (R799-800,816-817,819-820)

It was not at trial that the appellant first implicated Fat Boy. Immediately upon returning home, Robert mentioned Fat Boy's name, but stopped, desiring to protect him. (R460,474-475) The appellant also apparently told police about Fat Boy during his initial interview. (R835-836) However, as evidenced by the police officers' failure to submit adequate hair samples from Fat Boy, the police did not vigorously pursue their investigation farther than the suspect already in custody, Robert Buford. (R653-654,836-837) Additionally, the appellant told of Fat Boy's major role in the incident to court-appointed psychiatrists. (R43,45)

This evidence cannot be totally dismissed, as the trial judge did. There exists the very real possibility that Robert Buford was indeed only a mere accomplice whose participation in the murder

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was minor. (See additionally, Argument IV, supra.) This factor should be weighed in mitigation.

As noted in Argument III, supra, the United States Supreme Court has held in Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973 (1978), that mitigating factors cannot be limited to those enumerated in a statute. In addition to the enumerated mitigating circumstances found by the trial judge and those argued above, the appellant urges this Court to consider the following as mitigation: the appellant showed signs of remorse at what had happened (R43,45-46,462,473,777); the appellant, who had thought of leaving the state, voluntarily turned himself over to the police and fully cooperated with them (R464,474,522,699-701,704-708,741,766); the appellant has had a troubled home life (R46-47); and finally the undisputed testimony that Robert Buford was ordinarily a quiet, shy, very nice person, who had never been violent before this incident. (R502,946)

A proper weighing of the proper aggravating and mitigating circumstances can result only in the conclusion that life imprisonment is the appropriate sentence for the murder and sexual battery convictions. Robert's death sentences should be vacated.

ISSUE VII

THE TRIAL COURT ERRED IN REJECTING THE JURY'S RECOMMENDATIONS OF LIFE IMPRISONMENT AND IN SENTENCING THE APPELLANT TO THE DEATH PENALTY FOR EACH CAPITAL OFFENSE.

Under Florida's bifurcated capital-sentencing procedure, the jury hears evidence relevant to the aggravating and mitigating circumstances and then renders to the trial court an advisory sentence of life imprisonment or death, based upon the determination of a majority of the jury that the mitigating or the aggravating

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circumstances weigh the heaviest. §921.141(2) Fla.Stat. The input of the advisory sentencing jury is an integral part of the scheme of checks and balances provided by the Legislature in Section 921.141. Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

Early on, this Court recognized that the advisory opinion of the sentencing jury could, in some instances, be a critical factor in determining whether or not the death penalty should be imposed. Lamadline v. State, 303 So.2d 17 (Fla. 1974).

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court articulated the standard to be applied when it reviews a death sentence imposed notwithstanding a jury recommendation of life imprisonment:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d at 910. (Emphasis added.)

This Court in Tedder held that, even though the trial court had found no mitigating circumstances, under the facts and circumstances of that case there was no reason to override the jury's recommendation. This result was obtained even though the defendant had allowed the victim to languish without assistance or the ability to obtain assistance. Thus, the Court apparently recognized that the jury must have considered and weighed the aggravating and mitigating circumstances and found sufficient of the latter to recommend life imprisonment.

In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court, applying the Tedder standard, concluded that reasonable persons could differ with the death sentence imposed by the trial court

in that case and concurred with the jury's recommendation of a life sentence.[10/]

In the sentencing hearing in the instant case, the state offered no evidence relevant to any aggravating circumstances other than the evidence already introduced at trial. The defense attorney tendered testimony and argument to show several mitigating circumstances. (See Argument VI C, supra.) After due deliberation, a majority of the jury recommended that the court impose sentences of life imprisonment upon the appellant. (R982-983, 1108-1109) No less than seven reasonable jurors considered the facts of this case and voted to recommend that a life sentence be imposed.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), a sentence of death was reversed despite the trial court's findings of one aggravating circumstance and no mitigating circumstances. The victim was beaten to death and died as a result of cerebral and brain stem contusion. The victim was bruised all over the head and legs, her face was unrecognizable, and she had several internal injuries. These factors notwithstanding, this Court found the imposition of the death penalty unwarranted and determined that the jury's recommendation was appropriate. Justice England, specially concurring for three members of the Court, amplified the reasons for reversing the death sentence. In light of the respective functions of the judge and jury in death penalty cases, the judge's role is primarily to insure the jury's adherence to law and to protect against

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10/ Indeed, as the Fifth Circuit Court of Appeals noted in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case."

a sentence resulting from passion rather than reason.

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given the opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice....[B]oth our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists. Chambers v. State, 339 So.2d at 208-209 (England, Adkins, and Sundberg, JJ., concurring specially).

On the record before this Court, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended sentences of life imprisonment. There exists no compelling reason under the facts of the case sub judice that would justify the imposition of death sentences over the jury's recommendations. Burch v. State, 343 So.2d 831 (Fla. 1977). See also Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977). This Court, in reviewing the propriety of the death sentences, must weigh heavily the advisory opinions of the jury. Lamadline v. State, supra. The evidence in the instant case can certainly be reasonably interpreted to favor mitigation; under such circumstances the trial judge cannot override the jury's recommendations of life. Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). The trial court erred in doing so. Tedder v. State, supra.

In attempting to justify his rejection of the jury's life recommendations, the trial judge simply listed cases in which this Court has approved of the trial court's imposition of death notwithstanding a life recommendation. An examination of the facts of these cases (not presented in the instant trial court's order imposing

death) reveals that each and every one of these cases is distinguishable from the instant case.

In Hoy v. State, 353 So.2d 826 (Fla. 1977), this Court found that the totality of the circumstances, including atrocities committed on the victims before and after death, warranted death. The Court found three aggravating circumstances surrounding the two murders, while finding only two mitigating factors. In Barclay v. State, 343 So.2d 1266 (Fla. 1977), the Court found four aggravating and no mitigating circumstances. Also, the jury had recommended death for the co-defendant.

While only finding one aggravating circumstance in Dobbert v. State, 328 So.2d 433 (Fla. 1976), this Court found the circumstances surrounding the murder to be extremely aggravating. The facts of the case showed that the defendant was guilty of premeditated and continuous torture, brutality, sadism, and unspeakable horrors committed against his four children, eventually causing the death of two of them. No mitigating factors were present.

Similarly, the especially aggravating facts of Douglas v. State, 328 So.2d 18 (Fla. 1976), coupled with no mitigating circumstances distinguish this case from the one sub judice. In Douglas, the defendant abducted the victim and his girlfriend, forcing them at gunpoint to perform various sex acts while he watched. The defendant then shot the victim three times in the head while the girlfriend looked on. The girl finally was forced to perform sex acts on the defendant. Additionally, the trial judge had the benefit of a presentence investigation which had not been presented to the jury.

Gardner v. State, 313 So.2d 675 (Fla. 1975), is not applicable to support the instant trial judge's death order since Gardner

has been resentenced to life imprisonment following a remand by the United States Supreme Court. Finally, in Sawyer v. State, 313 So.2d 680 (Fla. 1975), the Court approved of the trial court's findings of four aggravating circumstances and no mitigating circumstances. Additionally, some aggravating factors were based upon certain facts which were not presented to the jury.

As can be seen from the foregoing, the cases relied on by the trial court to support his overruling of the jury can readily be distinguished from the facts of the instant case. Mitigating circumstances were present in the instant case. Even the aggravating factors found by the judge sub judice do not clearly outweigh the mitigating factors as they did in the foregoing cases. The totality of the circumstances, therefore, do not clearly warrant the death penalty. Finally, the trial judge was not in possession of additional facts unknown to the jury which would tilt the scales in favor of death as occurred in several of the trial court's cited cases.

In the instant case, the aggravating circumstances for both the murder and sexual battery convictions were outweighed by the mitigating circumstances relied on by the trial jury in rendering its advisory sentence of life imprisonment. There certainly is no "compelling reason" for overruling the jurors' recommendations. From the totality of the evidence it is apparent that the jury felt that although the evidence may have been sufficient to convict, it was insufficient to warrant imposition of the extreme penalty. The jurors deliberated only a short time before returning their life recommendation. (R980-983) Thus, the jurors had no difficulty in reaching agreement on the appropriate sentences. The facts suggesting

sentences of death were not so "clear and convincing that no reasonable person could differ." Tedder v. State, supra. Reasonable persons can and did differ over the fate of Robert Lewis Buford. The sentencing judge offered no compelling reasons for his decision to reject the jury's recommendations. The jury's recommended sentences were reasonable and appropriate in light of all the circumstances and this Court should reverse the death sentences and remand to the trial court with directions to impose life sentences.

ISSUE VIII

THE TRIAL COURT'S DENIAL OF THE APPELLANT'S REQUEST FOR A PRESENTENCE INVESTIGATION AND THE JUDGE'S SENTENCING THE APPELLANT TO DEATH WITHOUT THE BENEFIT OF SUCH REPORT VIOLATES THE APPELLANT'S RIGHTS TO EQUAL PROTECTION UNDER THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellant recognizes that in Hargrave v. State, ___ So.2d ___, 1978 FLW, SCO 329 (Fla. Case No. 48,135, decided June 30, 1978), and in In re: Fla.R.Crim.P. 3.710, ___ So.2d ___, 1978 FLW, SCO 406 (Fla. Case No. 49,355-D, decided September 7, 1978), a majority of this Court held that presentence investigation reports are discretionary in capital cases. The appellant respectfully requests this Court to reconsider this issue and recede from its previous holdings.

For the purpose of brevity, the appellant adopts Justice Hatchett's dissenting opinion in Hargrave v. State, 1978 FLW, SCO at 331-332. In his opinion, Justice Hatchett reasoned that under the rule and in accordance with Eighth Amendment principals requiring

the trial judge to take into consideration the character and record of the defendant before sentencing [See Lockett v. Ohio, ___ U.S. ___, L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976)], presentence investigations were mandated in capital cases. See also the dissenting opinions of Justices Boyd and Hatchett in In re Fla.R.Crim.P. 3.710, 1978 FLW, SCO at 406-407.

Presentence investigations, therefore, should be accorded all defendants convicted of capital offenses. However, even if a mandatory requirement for a presentence investigation is not approved by the majority of this Court, defense counsel's request for a presentence investigation should have been granted on equal protection, due process and cruel and unusual punishment grounds.

The appellant, an indigent, was represented at trial by court-appointed counsel. As a result of his indigency, the appellant and his counsel were unable to procure a sufficient investigation into the appellant's background.

Obviously, had the defendant been monied, he would have had the financial means to have conducted an investigation into his background. Such a discrimination against indigent persons cannot withstand constitutional scrutiny under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the cruel and unusual punishment proscription of the Eighth Amendment to the Constitution of the United States. Proffitt v. Florida, 428 U.S. 242 (1976); Anders v. California, 386 U.S. 738 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Shuman v. State, 358 So.2d 1333 (Fla. 1978). This discrimination also deprived the defendant of his rights to access to the courts, see Bounds v. Smith, 430 U.S. 817 (1977), and effective assistance

of counsel. See United States v. Pinkney, 551 F.2d 1241, 1248-1251 (D.C. Cir. 1976).

The denial of the defendant's request for a presentence investigation in this case also interferes with the defendant's right to "proportionality review." Proffitt v. Florida, 428 U.S. at 252.

This "proportionality review," that is, review by this Court of its decisions to insure proportionality of death sentences imposed, cannot result in even-handed justice if some defendants are afforded investigative means and others are arbitrarily denied them. This practice can only result in the arbitrary and capricious imposition of death in violation of Furman v. Georgia, 408 U.S. 238 (1972). In approving Florida's death penalty statute the Supreme Court of the United States viewed this Court's proportionality review as a protection "designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants." Proffitt v. Florida, 428 U.S. at 258. This protection cannot be provided the defendant where he was denied the means to present individualized sentencing information due to his indigency.

That presentence investigations are excellent sources of information relevant to the mitigating circumstances has been recognized by this Court and the Supreme Court of the United States. Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. at 252, n.9; Gregg v. Georgia, 428 U.S. 153, 189, n.37 (1976); Hargrave v. State, 1978 FLW, SCO at 331-332 (Hatchett, J., dissenting); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977); Swan v. State, 322 So.2d 485, 488-489 (Fla. 1975); Songer v. State, 322 So.2d 481, 484 (Fla. 1975).

Section 921.231, Florida Statutes, which governs the contents of presentence investigation reports, evidences their relevance to statutory and non-statutory mitigating circumstances. In its majority opinion in Hargrave, this Court held that the denial of the request for the presentence investigation was not prejudicial to the defendant because "[t]he trial court did not find as an aggravating circumstance that appellant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to another person." 1978 FLW, SCO at 330. This conclusion can neither be reconciled with the broad-based contents of presentence investigation reports under §921.231, nor the United States Supreme Court decisions in Gardner, Proffitt, and Gregg, nor this Court's decisons in Gibson, Swan, and Songer, supra.

Moreover, the unconstitutional application of Florida's death penalty statute in violation of Lockett v. Ohio, supra, serves not only to deprive the jury and judge of consideration of non-statutory mitigating circumstances as previously noted (Argument III, supra), but with the denial of a presentence investigation, also serves to deprive the indigent defendant of a vital means of effectuating the right to adduce non-statutory mitigating circumstances.

The appellant is thereby entitled to a new sentencing hearing with the benefit of a presentence investigation.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the appellant requests this Honorable Court to grant relief as follows: as to Point I, reverse the judgments and sentences on the sexual battery and burglary charges and remand for dismissal of those charges; as to Point II, reverse all three judgments and sentences and remand for a new trial; as to Points III - VIII, vacate the sentences of death imposed upon the appellant for the murder and sexual battery charges and remand for imposition of life sentences.

Respectfully submitted,

JACK O. JOHNSON
PUBLIC DEFENDER

By: James R. Wulchak
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 North Carpenter Street
Bartow, Florida 33830

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, 412 East Madison Street, Suite 800, Tampa, Florida, and to the defendant, Robert Lewis Buford, Florida State Prison, P.O. Box 747, Starke, Florida, 32091, by mail this 27th day of November, 1978.

James R. Wulchak
JAMES R. WULCHAK

consider.

Mr. Pickard, do you desire to present evidence or testimony at this time?

MR. PICKARD: No, sir, I have no additional witnesses to call.

THE COURT: Are you going to submit this case then to the jury on the evidence that they have heard on the first portion of this trial?

MR. PICKARD: Yes, sir, along with argument.

THE COURT: All right. Mr. Replogle, do you desire to present evidence or testimony at this time?

MR. REPLOGLE: Yes, Your Honor, the defense would call one witness, Elizabeth Buford.

THE COURT: All right, Elizabeth Buford.

ELIZABETH BUFORD, having been called as a witness by the defense and having been first duly sworn, testified on her oath as follows:

THE COURT: You may proceed.

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DIRECT EXAMINATION

BY MR. REPLOGLE:

Q Mrs. Buford, you are going to have to speak up loudly so you can be heard. In doing so, would you state your name and address, please?

A Elizabeth Buford. 41 Lake Ridge Homes.

Q Do you know Robert Lewis Buford?

A Yes.

Q And who is he?

A My son.

Q Have you had during his life time significant contact with him -- that is, living with him or residing with him in the same household?

A Yes.

Q For what period of time?

A All of his life outside of two weeks.

Q All right. What was the relationship that you had between yourself and your husband or Robert's father?

A We are married.

Q Are you separated or were you separated in 1977?

A Yes.

Q Robert was living with you, though?

A Yes.

Q All right. Within a time frame of a, let's say a

month prior to November 5th or the beginning of November 1977, have you had any contact with Robert?

A. Yes.

Q And what contact was that?

A. He lived with me the first part of themonth.

Q All right. During that period of time did you have any, uh, interaction with Robert of an unusual nature?

A Yes.

Q And would you describe for the jury what that was?

A Nature meaning his ways of action?

Q Was there anything unusual about his behavior or conduct during that period of time?

A Oh, yes.

Q Would you describe what that was?

A I would have problems at him with drugs, alcohol, --

Q Would you describe for the jury the extent of the problen you were experiencing with Robert?

A I have encountered times that he have come home in the state that he didn't know that he was home, or where he was, or who he was, or who I was.

Q Robert did not even know who he was?

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A No, sometimes he wouldn't.
Q What was your experience with the type of substances that he was, uh, taking or abusing?
A What was my experience?
Q What was he taking or abusing that put him in that condition?
A Marijuana, alcohol and maybe pills. I never seen him take the pills but I had seen occasionally at him drinking very heavily and smoking marijuana.
Q With relation to the death of Toni Wright on November 5 or November 6, when was it that you saw him in this state where he was not aware of who he was, where he was, this type of thing?
A About a week and a half before.
Q And how many times did you see that kind of behavior from Robert?
A That was constantly.
Q During the two weeks that he was with his father at the Lake Ridge Homes where his father lived, did you have occasion to see Robert during that time?
A Yes.
Q Did you notice during that period of time whether or not he was continuing his abuse of these substances?

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A Yes, more than he was when he was living with me.

Q During the time, during Robert's lifetime had you come to, uh, be aware of Robert's reputation in ya'll's community for violence?

A Yes.

Q By that I'm not asking about specific instances, but what the community opinion is of Robert. Are you aware of that?

A Yes.

Q Can you relate to the jury what his reputation is in the community for violence?

A He's not violent, he's a quiet type person.

Q Is he known to fight or to, uh, direct violence toward other persons?

A No.

MR. REPLOGLE: I have nothing further, Your Honor.

THE COURT: Cross-examination?

MR. PICKARD: Just a couple of questions.

CROSS-EXAMINATION

BY MR. PICKARD:

Q Mrs. Buford, you have indicated to the Court that various problems that you say your son had concerning

case that you have no regrets about it; that it be one that was the right decision whichever way the verdict is or the recommedation, be the one that was the right one in this case -- the one that was the fairest.

I would ask that in this, which is basically our season of forgiveness of sins and renewal of faith, that you forgive this man what he has done, and in short I'm asking you that you spare in your recommendation Robert Buford's life. That the penalty that he will suffer with a life recommendation is the one that would be best in this case.

Thank you.

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder and for his crime of sexual battery. As you have been told, the final decision as to what punishment shall be imposed is my sole responsibility. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination

"A majority of the jury advise and recommend to the Court that it impose a life sentence or sentence of life imprisonment upon the defendant for the crime of sexual battery."

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment. And I want to reemphasize to you that you must consider each of these crimes separately. You will now retire to consider your recommendation; and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation which will be provided to you with these written instructions should be signed by your foreman and returned to the Court.

All right, members of the jury, you may now further retire for your deliberations. All rise.

(The jury retired to deliberate at 5:21 p.m.)

JURY OUT:

THE COURT: All right, please be seated. All right, Mr. Replogle,

other than as we noted while the jury was absent, were there any objections or corrections to the instructions as given by the Court?

MR. REPLOGLE: No, sir.

THE COURT: Mr. Pickard?

MR. PICKARD: None, Your Honor.

THE COURT: All right, gentlemen, we will stand in recess until the jury has advised us they have reached a decision.

(Recess.)

(Court reassembled at 6:03 p.m.)

THE COURT: All right, now, I'm advised the jury has returned its advisory sentence. I will again comment to the spectators that I will tolerate absolutely no reaction to the verdict of this jury. Remain standing, bring the jury back, please.

(The jury returns to the courtroom at 6:04 p.m.)

JURY IN: